United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

197

BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 19,193

18

William C. Coleman, Appellant

v.

United States of America, Appellee

APPEAL FROM ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

EDWARD BENNETT WILLIAMS
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Counsel for Appellant

STATEMENT OF QUESTIONS PRESENTED

1. What is the scope of appellate review of a district judge's decision under the resentencing proviso of P.L. 87-423, D. C. Code § 22-2404 (1961 ed., Supp. IV), empowering the judge to determine whether a defendant tried prior to the effective date of the Act shall be punished by life imprisonment or death.

2. Whether, in a hearing under the resentencing proviso of P.L. 87-423, the burden of proof or persuasion is upon the defendant.

3. Whether "circumstances in mitigation", within the meaning of the resentencing proviso of P.L. 87-423, include the factors of favorable prospects for rehabilitation, unlikelihood of recidivism, previous good reputation in the community, and model post-conviction conduct; and factors which have disadvantaged the defendant, mental retardation and socio-economic deprivation.

4. Whether the lack of findings of "circumstances in aggravation" within the meaning of P.L. 87-423 vitiates the conclusion of the Court below that the defendant should not be sentenced to life imprisonment instead of death.

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5. Whether under P.L. 87-423 the Court below should have considered pre-trial statements, not previously produced to the defense, given to police officers by the government's sole eyewitness to the homicide and contradicting his trial testimony on the critical issue of whether defendant had attempted to surrender prior to the homicide.

6. Whether it is a pertinent consideration under P.L. 87-423 that decisions of this Court and the Supreme Court subsequent to affirmance of appellant's conviction indicate that evidence admitted at appellant's trial was unlawfully obtained, or that appellant might have had a valid insanity defense because of mental defect.

7. Whether under P.L. 87-423 the District Court may consider expert testimony that capital punishment does not deter commission of homicides in general or fatal attacks on police officers in particular; and whether the Court may base its decision on a deterrent theory without consideration of such evidence.

8. Whether on this record imposition of the death penalty would constitute cruel and unusual punishment.

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TABLE OF AUTHORITIES

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* Cases and authorities chiefly relied upon are marked by asterisks.

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In The

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 19,193

William C. Coleman, Appellant

v.

United States of America, Appellee

APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant's motion for reduction of sentence and amended motion for imposition of sentence of life imprisonment were denied by the United States District Court for the District of Columbia, Hon. Joseph C. McGarraghy, J., on January 8, 1965 (Op., 15).*/ The order of denial followed a hearing, held

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*/ Record references to the proceedings below subsequent to this Court's remand will be cited to the pleadings and materials in the original record and to the transcript of proceedings before Judge McGarraghy on October 5, 6 and 7, 1964 (cited "Tr."). Judge McGarraghy's opinion of January 8, 1965, will be cited "Op." References to pre-remand proceedings below will, except where otherwise indicated, be cited to the printed joint appendices in appellant's prior appeals, No. 15,915 and Nos. 17,176-77. These appendices were paginated consecutively so that page references from 1 through 398 are to the record on the first appeal (Coleman I), and from 401 through 479 to the record on the second appeal (Coleman II).

October 5 through 7, 1964, pursuant to this Court's mandate in Coleman v. United States, __ U.S.App.D.C. __, 334 F.2d 558 (1964).

On January 13, 1965, appellant moved for leave to appeal in forma pauperis from the order of January 8, 1965, and this motion was granted by Judge McGarraghy on January 19, 1965. (Docket entries, Jan. 13 and 19, 1965.) The jurisdiction of this Court is founded upon 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This case was previously before the Court en banc in No. 15,915, Coleman v. United States, 111 U.S.App.D.C. 210, 295 F.2d 555 (1961) (hereinafter cited as Coleman I); and in Nos. 17,176-77, Coleman v. United States, __ U.S.App.D.C. __, 334 F.2d 558 (1964) (hereinafter cited as Coleman II).*/ In Coleman I this Court unanimously affirmed appellant's conviction of robbery, and affirmed by a majority of five to four appellant's conviction of first degree murder in perpetration of the robbery. Certiorari was denied, 369 U.S. 813 (1962)

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*/ For the sake of brevity, appellant does not include in this statement of the case an account of the proceedings below in Coleman I and Coleman II. Such accounts are included in appellant's statement of the case in his brief in Coleman I (Brief, pp. 2-5) and Coleman II (Brief, pp. 2-17), which appellant respectfully incorporates by reference.

(Justices Brennan and Stewart dissenting); rehearing was denied, 369 U.S. 842 (1962) (Justice Douglas being of the opinion that a response to the petition for rehearing should be requested).

In Coleman II, this Court remanded "only that the judge may conduct an inquiry and appellant be afforded a hearing pursuant to and as discussed in part I" of the Court's opinion. 334 F.2d at 566. In part I the Court had ruled that the determination under P.L. 87-423 of "whether the case 'justifies a sentence of life imprisonment'" should be based upon "an appropriate inquiry as to all factors bearing upon the 'fateful choice of sentences.'" Id. at 563 (footnotes omitted).

Following receipt of this Court's mandate, Judge McGarraghy ordered a report by the probation officer (Memorandum of June 5, 1964; Tr. 59). On July 13, 1964, the Court entered an order, upon consent of the parties, that the probation officer's report and annexed materials, received by the Court on July 7, 1964 and made available by the Court to counsel, be filed as part of the record. (Order of July 13, 1964.) A further consent order provided for the examination of defendant

at the expense of the United States by one psychiatrist designated by the United States Attorney and one designated by defendant's counsel. (Order of July 13, 1964.) The report of a third psychiatrist, Dr. Lanham of the Legal Psychiatric Services, was annexed to the probation officer's report (Report of Dr. Lanham, June 30, 1964; Tr. 62). The reports of the psychiatrists named by the respective counsel, Dr. Francis F. Barnes (defense) and Dr. Alfred A. Marland (government), were filed in September, 1964. (Docket entry, Sept. 22, 1964; see Tr. 8.)

The information before the Court in the probation officer's report with annexed documents, the psychiatric reports, and the record of prior proceedings, was supplemented by an evidentiary hearing held before Judge McGarraghy on October 5, 6 and 7, 1964. At the hearing the government took a neutral position on the issue of sentence (Tr. 3, 228). The hearing was conducted upon allegations of defendant's Amended Motion for Imposition of Sentence of Life Imprisonment, which added to the four grounds alleged in defendant's pre-remand motion additional grounds numbered from 5 through 31. (Tr. 4-5;

Amended Motion for Imposition of Sentence of Life Imprisonment.)*/ In addition to testimony and materials introduced pursuant to stipulation, the Court heard live testimony from six witnesses called by the defendant, and three witnesses called by the government. To avoid repetition, this testimony will be discussed in the points of the brief to which it particularly relates; at this point appellant will indicate only the general subject matter covered by each witness.

Dr. Francis F. Barnes testified as to his findings of defendant's mental deficiency, absence of psychosis, defendant's panic state at the time of the homicide, and the relation of the mental deficiency and panic state to the events leading up to and culminating in the homicide. (Tr. 7-32).

Reverend Robert B. Robey, the Protestant Chaplain for the District of Columbia Department of Corrections, who had been defendant's pastor during his years on "death row", testified as to the conduct and personality traits exhibited by defendant during these years, the changes that defendant had undergone during this period, and his prospects for rehabilitation. (Tr. 33-46.)

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*/ Defendant's summary of evidence and contentions with respect to each of the grounds of the motion appears at Tr. 274-304.

William E. Hemple, the probation officer assigned to defendant's case, testified as to the basis of certain materials in the probation report. (Tr. 47-60.) He also testified that, "My personal recommendation would be for imposition of the life sentence", this recommendation being based both upon his knowledge and training as a probation officer and upon his personal feelings against the death penalty. (Tr. 55; see Tr. 66, 179-80.)

Professor Thorsten Sellin, Professor of Sociology at the University of Pennsylvania and author of the ALI study on The Death Penalty (1959), gave expert testimony as to the incidence and trends of capital punishment, and the statistical and other bases for his opinion that capital punishment has not been a deterrent to homicides in general or of police officers in particular. (Tr. 75-138.)

Professor Norman Dorsen, Professor of Law at New York University, gave further expert testimony on capital punishment directed primarily to asserted inequalities in its imposition. (Tr. 180-210.)

Dr. Bertram S. Brown, a psychiatrist with special qualifications in the area of mental retardation and

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former Deputy Special Assistant to President Kennedy for Mental Retardation, gave testimony on the relation between mental retardation and homicide in general, based on statistical studies, and his opinion based on the records in this case of the relation between defendant's retardation and his commission of the offense. (Tr. 145-175.)

The government called Dr. Marland, consultant to the Department of Corrections, who testified as to his findings that defendant was mentally retarded but not psychotic, and gave his expert opinion as to defendant's mental state at the time of the homicide, defendant's prospects for rehabilitation or recidivism, and defendant's adjustment to and influence upon the prison community. (Tr. 228-43.)

Barbara E. Robinson, the Criminal Docket Clerk in the United States Attorney's office, presented statistical testimony as to the number of indictments for first degree murder returned in the two and one-half year periods preceding and following repeal of the mandatory death sentence statute for the District of Columbia. (Tr. 243-48.)

The final government witness, Detective Bernard F. Kelly of the Homicide Squad, Metropolitan Police Department, testified as to the number and disposition of cases since 1954 in which a policeman was killed in line of duty. (Tr. 249-63.)

On January 8, 1965, the Court rendered its opinion, denying defendant's motion for reduction of sentence and amended motion for imposition of sentence of life imprisonment. The memorandum opinion constituted the Court's findings of fact and conclusions of law (Op. 15). The opinion made findings as to the defendant's background, the defendant's mentality, the circumstances of the crime and the defendant's post-conviction conduct. (Op. 4-9.) The findings will be discussed more fully in pertinent portions of the Argument.

In brief the Court found that defendant and his family enjoyed "an unusually good reputation" in the community where he was born and raised, Louisa County, Virginia (Op. 4); that, "Clinically, he has an IQ of about 71 and he is sub-normal intellectually, but at a level that functioned satisfactorily as a laborer and truck driver" (Op. 6); that the idea for the

robbery was suggested by defendant's brother, Raymond, and agreed to by defendant (Op. 7); that defendant had been drinking on the day of the crime (Op. 7); that when he was discovered by the police and fled, defendant "became frightened and panicked, the scuffle with Officer Brereton occurred, and the shooting took place, resulting in Officer Brereton's death" (Op. 7-8); and that, "The defendant has been a model prisoner. He is a fairly good influence on those who are around him. He would be a good risk for rehabilitation. The possibilities of recidivism are remote. He has adjusted to prison life and would be a good influence to the prison community" (Op. 8-9).

The Court ruled that the expert testimony on capital punishment was not germane to its decision, but presented a matter for Congress rather than the Court (Op. 9-10.) The Court further ruled that defendant's contention that judicial decisions subsequent to affirmance of his conviction indicated that the conviction was erroneous, was not an appropriate consideration. (Op. 10-11.)

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With respect to the circumstances of the offense, the Court's view was:

> "Such killings generally do result from fright or panic, but that does not constitute a justification or a mitigating circumstance. The applicable statute under which defendant was convicted does not require proof of premeditation or of intent or desire to kill. It applies to precisely the factual situation which prevailed in the instant case. (Op. 12.)*/
>
> * * *
>
> "In my opinion, the defendant and his brother were engaged in a nefarious venture, the type of which happens too often." (Op. 14.)

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*/ Each of the three psychiatrists who examined defendant indicated that the killing was unintentional. Dr. Marland believed that, "He probably felt he was defending his life and he perhaps acted instinctively rather than logically. . . ." (Tr. 231). Dr. Barnes and Dr. Lanham were of the view that the defendant panicked and "sincerely believed his own life was in danger." (Tr. 16, 18-19; Report of Dr. Lanham, p. 2.)

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The Court concluded that there were no "circumstances in mitigation of punishment."

> "There was competent and convincing testimony upon which I find that none of the circumstances of the defendant's past life, his mental condition, or of the crime itself provide a reasonable medical or psychiatric explanation for the offenses of which he was convicted. I further find that none of these circumstances are in mitigation of punishment.
>
> The reports of the Chaplains of the adjustment which the defendant has made in the places of his confinement are encouraging and, if factors of a mitigating character were present, they would carry weight in resolving the issue. However, standing alone, his subsequent conduct in prison is not a circumstance in mitigation of punishment." (Op. 13-14.)

The Court did not designate any of the findings as findings of "circumstances in aggravation" other than the following:

> "In my opinion, rather than mitigation, the fact that the defendant departed from the training which he had received from his mother and failed to live up to the reputation which he and the other members of his family enjoyed in their home community constitutes a factor more in aggravation than in mitigation." (Op. 13.)

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STATUTE INVOLVED

P.L. 87-423, 76 Stat. 46 (1962), D. C. Code § 22-2404 (1961 ed., Supp. IV) provides as follows:

> "§ 22-2404. Punishment for murder in first and second degrees.
>
> The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall inform the court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment.
>
> Notwithstanding any other provision of law, a person convicted of first degree murder and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.
>
> Whoever is guilty of murder in the second degree shall be imprisoned for life or not less than twenty years.
>
> Cases tried prior to March 22, 1962, and which are before the court for the purpose of sentence or resentence shall be governed by the provisions of law in effect prior to March 22, 1962: Provided, That the judge may, in his sole discretion, consider circumstances in mitigation and in aggravation and make a determination as to whether the case in his opinion justifies a sentence of life imprisonment, in which event he shall sentence the defendant to life imprisonment. Such a sentence of life imprisonment shall be in accordance with the provisions of this Act.

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"In any case tried under this Act as amended where the penalty prescribed by law upon conviction of the defendant is death except in cases otherwise provided, the jury returning a verdict of guilty may by unanimous vote fix the punishment at life imprisonment; and thereupon the court shall sentence him accordingly; but if the jury shall not thus prescribe the punishment the court shall sentence the defendant to suffer death by electrocution unless the jury by its verdict indicates that it is unable to agree upon the punishment, in which case the court shall sentence the defendant to death or life imprisonment."

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STATEMENT OF POINTS

1. Under P.L. 87-423, the burden is not upon the defendant to prove that the "circumstances in mitigation" outweigh those "in aggravation", or to show that his sentence should be reduced to life imprisonment.

2. The findings of the Court below that the defendant had favorable prospects for rehabilitation, presented little risk of recidivism, enjoyed a previous good reputation in his community and had displayed model post-conviction conduct, as well as the findings and evidence of defendant's mental retardation and background of socio-economic deprivation, showed the existence of "circumstances in mitigation" within the meaning of P.L. 87-423.

3. The absence of findings of "circumstances in aggravation" leaves no basis for sustaining the decision in favor of the death sentence under P.L. 87-423.

4. The Court below should have considered, as pertinent to its decision under P.L. 87-423, pre-trial statements not previously turned over to the defense, which contradicted the trial testimony of the government's sole eye-witness of the homicide on the issue of whether the felony had terminated prior to the homicide.

5. Opinions of this Court and of the Supreme Court, subsequent to affirmance of appellant's conviction, should have been considered pertinent to the district court's decision under P.L. 87-423, to the extent that they raised a doubt as to the legality of evidence introduced at defendant's trial, or showed that defendant might have had a valid insanity defense based upon a mental defect.

6. The Court below should not have held that only Congress and not the Court can properly consider the extensive evidence in the record that capital punishment has not been a deterrent to perpetration of homicides in general or against police officers in particular, and should not have based its decision on a deterrent theory without consideration of this evidence.

7. On this record the imposition of a sentence of death would constitute cruel and unusual punishment, in light of the evidence and findings concerning defendant set forth in point 2, the circumstances of the offense, and the virtual abandonment of capital punishment in this and most other jurisdictions.

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The Court below considered beyond its purview, and reserved to consideration of Congress, the extensive expert testimony that the defendant's execution would not, so far as available studies can show, have any deterrent effect on homicides in general or fatal attacks upon police officers in particular. The Court also barred from consideration the question of whether judicial decisions subsequent to affirmance of appellant's conviction indicate that such conviction rested on unlawfully obtained evidence, or that defendant failed to assert a valid insanity defense at trial. The Court did not consider the effect of evidence that the government's sole eyewitness had made a prior statement, quoted in the probation report, which was inconsistent with his trial testimony on a critical point.

On this record, appellant's most basic contention is that his execution would constitute "unnecessary cruelty", serving no purpose beyond retribution, and that it is therefore prohibited by the constitutional guarantee against cruel and unusual punishment under "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-101 (1958); Rudolph v. Alabama, 375 U.S. 889 (1963) (opinion dissenting from denial of certiorari). But in

SUMMARY OF ARGUMENT

At the hearing held pursuant to this Court's remand in Coleman II, the district court found that defendant had favorable prospects for rehabilitation and, if sentenced to life imprisonment, would continue his model post-conviction conduct as a prisoner, constitute a good influence on the prison community, and present little risk of recidivism. The Court also found that defendant had enjoyed an excellent reputation in the community where he was raised; that he was reared in circumstances of poverty and limited economic opportunity; and that he was and is mentally retarded. The Court held that none of the foregoing findings established "circumstances in mitigation" within the meaning of P.L. 87-423.

The Court did not make any findings that there were "circumstances in aggravation" of punishment within the meaning of P.L. 87-423, with the single exception that it found defendant's good home training and reputation "more in aggravation than in mitigation".

appellant's view it should be unnecessary to reach this ultimate constitutional question, because under the applicable statutory test "circumstances in aggravation" have not been shown or found to outweigh the "circumstances in mitigation". The imposition of the burden upon defendant on this issue is in itself grounds for reversal. But even if he has the burden, upon this record defendant has sustained it. Alternatively, the burden would have been sustained if the Court had not construed the statute so narrowly as to limit "circumstances in mitigation" essentially to those which furnish a "medical or psychiatric explanation for the offenses" (Op. 13), or if factors properly pertinent under the statute had not been excluded from consideration.

As a remedy for the errors asserted, this Court has power to remand with directions to impose a sentence of life imprisonment.

ARGUMENT

INTRODUCTORY: THE SCOPE OF REVIEW

A threshold question bearing upon all of the points of this appeal is the scope of appellate review of Judge McGarraghy's decision, and the relief which is accordingly available if any or all of appellant's points are sustained.

If appellant's most fundamental challenge be sustained, and it be held cruel and unusual punishment to impose a death sentence on appellant (point VII), there is no doubt that this Court may order imposition of a sentence of life imprisonment. On appellant's non-constitutional points, the scope of review and the maximum extent of relief available -- remand for sentence to life imprisonment or only remand for further hearing -- depends in part on whether the resentencing proviso of P.L. 87-423 is treated differently from the usual statutory authorization for imposition of a sentence of imprisonment.

Appellant submits that the scope of review of decisions under the resentencing proviso of P.L. 87-423 is basically different from that applied to ordinary sentencing

decisions under federal penal statutes. Ordinarily such a statute is prospective, applying to an unlimited group of offenses that may be committed in the future, and conferring upon the sentencing judge the power to impose a vast range of possible alternative punishments. E.g., for the offense of embezzlement under D. C. Code § 22-1202, Congress has empowered the sentencing judge to select any number of years, months or even days up to ten years imprisonment as a maximum sentence, and any minimum sentence so long as it is no more than a third of the maximum. A fine in any amount up to $1,000 may also be imposed. In addition, there are the alternatives afforded by the probation statutes. An attempt to review the merits of the particular combination of maximum and minimum terms selected by the sentencing judge in such a case is a far different situation than review under the proviso of P.L. 87-423.

In enacting this proviso, Congress was legislating retrospectively, for a very small group of cases (only two as it developed*/) where the offense had already been committed and

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*/ The only two cases in which the proviso has been invoked or applied are the instant case and Jones v. United States, 117 U.S.App.D.C. 169, 327 F.2d 867 (1963) (hereinafter cited as Jones).

trial held. See Coleman II at 560 and n. 9. For these cases Congress allowed the district judge a choice between only two alternatives: a life sentence or death by electrocution. Congress further prescribed the criteria to be considered: "circumstances in mitigation and in aggravation", and the legislative history showed the relative weight to be given each:

> "If the factors in aggravation outweigh those in mitigation, [the judge] shall impose a sentence of death by electrocution. If, in his judgment, the factors in mitigation outweigh those in aggravation, he shall impose a sentence of life imprisonment." H. R. Rep. No. 677, 87th Cong., 1st Sess., p. 2, */ quoted in Jones v. United States, 117 U.S.App. D.C. 169, 179, 327 F.2d 867, 877 (1963) (concurring opinion).

Nor is review precluded by the provision of P.L. 87-423, "That the judge may, in his sole discretion, consider circumstances in mitigation and aggravation and make a determination . . . ." This Court in Coleman II construed the language "to make the appropriate determination 'in his sole discretion' -- that is, sitting without a jury." 334 F.2d at 563 (emphasis supplied). By contrast, the prospective part of P.L. 87-423 provides for the discretion to be given to or shared with the jury in future cases. The language expressly conferring

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*/ Following the oral argument in Coleman II, this Court granted appellant's motion for leave to file ten copies of this House Committee Report, which had been relied upon at argument. (Order of May 28, 1963, Nos. 17,176-77.)

"discretion" to choose the appropriate sentence -- language absent from most federal penal statutes -- does not militate against appellate review. On the contrary, the contempt statute, 18 U.S.C. § 401, empowers the sentencing court "to punish by fine or imprisonment, at its discretion" -- and it is sentences under this statute which the Supreme Court has asserted power to revise and reduce on review. See Green v. United States, 356 U.S. 165, 188 (1958); Yates v. United States, 356 U.S. 363, 366-67 (1958); United States v. UMW, 330 U.S. 258, 304-05 (1947).

Appellant submits that it is appropriate for this Court, in a capital case, to consider on the record before it whether or not "the factors in aggravation outweigh those in mitigation" (H. R. Rep. No. 677, supra). Here, unlike the ordinary sentencing situation, the probation officer's report is part of the record on appeal before this Court, and the reasons for the district judge's decision on sentence have been set forth in a written opinion. Cf. Wilson v. United States, __ U.S.App.D.C. __, 335 F.2d 982, 984 (1963): "The sentence seems to us extremely harsh, but circumstances not disclosed by the record may justify it."

The record before Judge McGarraghy comprised the probation officer's written report and other documentary materials, and live testimony from witnesses, primarily experts, whose credibility was not questioned by the government or in the Court's opinion. Where a district judge's decision rests on documentary material, stipulated testimony, or testimony whose credibility is not in dispute, rather than upon the judge's assessment of the credibility of live witnesses, a broader scope of appellate review is warranted, and the reviewing court is in as good a position as the district court to determine the facts. See 5 Moore, Federal Practice § 52.04 (1964) and authorities there collected; United States v. Aviles, 315 F.2d 186, 191 (2d Cir. 1963), vacated sub nom Evola v. United States, 375 U.S. 32 (1963), reaffirmed, 337 F.2d 552 (2d Cir. 1964), cert. denied, 13 L.Ed.2d 794 (1965).

If this Court should sustain appellant's contentions that the district court applied an erroneous burden of proof or erroneously interpreted the applicable statute, then it would not be bound by Judge McGarraghy's factual findings, nor his conclusions of law based on those findings.

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> "[T]he settled doctrine [is] that 'findings of fact that are induced by an erroneous view of the law are not binding.' 5 Moore, Federal Practice, § 52.03[2], at 2631 (2d ed. 1951); accord, United States v. Singer Mfg. Co., 374 U.S. 174, 193 (1963), 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963); United States v. Parke, Davis & Co., 362 U.S. 29, 44, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); United States v. United States Gypsum Co., 333 U.S. 364, 394, 68 S.Ct. 525, 92 L.Ed. 746 (1948)." United States v. Aviles, 337 F.2d 552, 557 (2d Cir., 1964), cert. denied, 13 L.Ed.2d 794 (1965).

If the Court holds that the findings below should be set aside because of an erroneous legal ruling, this Court may itself apply the correct rule of law to the evidence in the record and reach its own findings and conclusions. See United States v. Consolidated Laundries Corp., 291 F.2d 563, 569 (2d Cir. 1961); United States v. Aviles, supra, 337 F.2d at 557 ("in all the cases cited, the Supreme Court not only stated the correct legal standard but went on to make its own findings of fact").

If, on the other hand, this Court holds that the scope of review herein is no different from review of a sentence of imprisonment, then the relief for any meritorious assertions of error arguably might be limited to a remand for rehearing. But there is authority that an appellate court, in the exercise of its supervisory powers, may remand with directions to impose a reduced sentence, even though the district court's

sentence was not in violation of statute. See Yates v. United States, 356 U.S. 363 (1958); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), on remand 184 F. Supp. 679 (N.D.Ill. 1960); Note, 109 U.Pa.L.Rev. 422, 424, 427 (1961). While the Supreme Court has observed that it has not been given "power to revise sentences, the power to increase as well as the power to reduce them", Gore v. United States, 357 U.S. 386, 393 (1958)*/, it has ruled that it may in the exercise of its supervisory power set aside a sentence for criminal contempt and remand with directions to reduce the sentence to the time already served. See Yates, supra, at 366-67.

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*/ Three members of the Supreme Court, on a point not discussed by the majority, recently implied that Gore has not resolved the question whether there is power to review the length of a sentence within the statutory maximum. United States v. Tateo, 377 U.S. 463, 475, n. 5 (1964) (dissenting opinion). See also Note, 109 U.Pa.L.Rev. 422, 423 and 424, n. 17.

Recent decisions of this Court indicate that the merits of sentencing decisions are not immune from appellate scrutiny. In Butler v. District of Columbia, __ U.S.App.D.C.__, __ F.2d __ (No. 18,606, March 18, 1965), this Court under the authority of 28 U.S.C. § 2106 to formulate a mandate "just under the circumstances", reversed and remanded with directions to dismiss the information, because the sentence even if within the statutory maximum was imposed upon the basis of invalid procedures and subjective standards. In Epperson v. Anderson, 117 U.S.App.D.C. 122, 123, 326 F.2d 665, 666 (1963), where the appellant claimed that the sentencing court abused its discretion in not making his sentence fifty-two days shorter, this Court held: "An appellate court has, of course, a very limited function indeed when the contention before it is that the sentencing judge has abused his discretion in fixing the sentence within the conceded range of legislatively prescribed punishment. We have no occasion to interfere with the discretion exercised in this case." In other cases this Court, without any implication of abuse of discretion below, has deemed it appropriate to comment upon the sentence and to suggest that the district court consider granting a reduction

under Rule 35, F.R.Crim.P. See United States v. Scarbeck, 115 U.S.App.D.C. 135, 158, 317 F.2d 546, 569 (1962) (suggesting consideration whether three consecutive ten-year sentences should be reduced to concurrent sentences), 223 F. Supp. 900 (D.D.C. 1963) (reducing sentences from consecutive to concurrent); Wilson v. United States, __ U.S.App.D.C. __, 335 F.2d 982, 984 (1963):

> "We recognize, of course, that the imposition of sentence is in the sound discretion of the District Judge. The sentence seems to us extremely harsh, but circumstances not disclosed by the record may justify it. We think the District Court should seriously consider exercising its power under Fed. R. Crim. P. 35 to reduce the sentences imposed. Cf. Husty v. United States, 282 U.S. 694, 703, 51 S.Ct. 240, 75 L.Ed. 629 (1931); United States v. Daugherty, 269 U.S. 360, 364, 46 S.Ct. 156, 70 L.Ed. 309 (1926); Scarbeck v. United States, 115 U.S.App.D.C. 135, 317 F.2d 546, 569 (1962)." 335 F.2d at 984.

In any event, even assuming that there be no power to review the merits of the sentencing decision below, it is clear that the decision may be set aside and remanded if, because of procedural error or any other reason, pertinent factors have not

been weighed in reaching the decision. Just such review and remand was accorded by this Court in the only two cases that have come before it under the proviso of P.L. 87-423: Coleman II and Jones, supra. Accord: Leach v. United States, 115 U.S.App. D.C. 351, 320 F.2d 670 (1963), __ U.S.App.D.C. __, 334 F.2d 945 (1964); Peters v. United States, 113 U.S.App.D.C. 236, 307 F.2d 193 (1962); United States v. Wiley, 267 F.2d 453 (7th Cir. 1959); Note, Appellate Review of Sentencing Procedure, 74 Yale L.J. 379 (1964); Note, 109 U.Pa.L.Rev. 422, 427-28 (1961).

In this case, appellant submits, as in Butler, supra, the remedy most "just under the circumstances" for procedural or substantive error in sentencing, would not be remand for reconsideration but remand with directions as to disposition. After appellant's five years to date spent under the conditions of "death row" (see Tr. 35-40), for this Court to require a life sentence rather than to remand for reconsideration would be "just under the circumstances", as 28 U.S.C. § 2106 prescribes.

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I. THE BURDEN OF PROOF AND PERSUASION SHOULD NOT HAVE BEEN IMPOSED UPON APPELLANT

(Tr. 4-7)

In Coleman II, this Court did not reach the contention, raised by appellant, that Judge McGarraghy had erroneously placed the burden upon the defendant to persuade the district court that mitigating factors warranted a sentence of life imprisonment. (Brief for Appellant in Coleman II, pp. 78-81; see JA 443-44, 444-47.) On remand the contention was renewed,*/ and Judge McGarraghy adhered to his prior position. (Tr. 6-7.) The position is based on the view that the proper procedure under P.L. 87-423 is a motion for reduction of sentence,**/ upon which the movant bears the burden of persuasion. (See Tr.6.)

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*/ In his amended motion, on which the hearing below was held (see Tr. 4-5), appellant amended the caption of his original motion -- which had been styled "Motion for Reduction of Sentence to Life Imprisonment" -- to "Motion for Imposition of Sentence of Life Imprisonment". (Amended Motion for Imposition of Sentence of Life Imprisonment, p. 1).

**/ "THE COURT: I am of the opinion it is not a re-sentencing under the opinion of the Court of Appeals but is a matter of motion for reduction of sentence." (Tr. 6.)

The view that the motion is one for reduction of sentence had previously been taken by the government before Judge McGarraghy when he requested memoranda on the procedure to be followed upon the remand in Jones, supra. United States v. Jones, Cr. No. 843-58 (D.D.C.), "Government's Memorandum on the Court of Appeals Opinion Dated September 13, 1963 in Willie Jones v. United States of America, No. 17,845," p. 1.

But it appears that a majority of this Court does not so view the procedure under the new statute. Judge Wright, joined by Chief Judge Bazelon and Judge Fahy concurring in Jones, supra, viewed the statute as requiring "resentencing." 117 U.S.App.D.C. at 179, 327 F.2d at 877. Their opinion expressly referred to and rejected Judge McGarraghy's ruling upon burden of proof in the pre-remand Coleman hearing.

> "[T]he court [in Jones] placed the burden on the defendant, as the moving party, to show that his sentence should be reduced to life imprisonment. While the placement of the burden on the appellant is not in terms spelled out in the court's opinion, the companion case of Coleman v. United States, decided by the same judge under Public Law 87-423, leaves no doubt as to the court's position. There, in denying a similar motion, the court stated to counsel for the defendant: 'It seems to me perfectly clear that under the statute you have not shown circumstances in mitigation that would warrant the Court in doing other than what the statute provides, namely, carry out the sentence which was in effect prior to the effective date of the statute.' In deciding the instant case, the trial judge referred to Coleman as a precedent and indicated he would follow the principles there announced by him.
>
> "Public Law 87-423 does not put the burden of proof upon the defendant to show that he should not be executed. It simply states that the judge, in resentencing, 'may, in his sole discretion, consider circumstances in mitigation and in aggravation.' The House Committee Report

> "explains this language: 'If the factors in aggravation outweigh those in mitigation, [the judge] shall impose a sentence of death by electrocution. If, in his judgment, the factors in mitigation outweigh those in aggravation, he shall impose a sentence of life imprisonment.'" Ibid. (Footnote omitted.) See also Coleman II at 566 (concurring opinion).

The other members of this Court have not expressly ruled on the burden of proof question. It might be argued that a footnote reference in the Jones majority opinion implied that Rule 35, F.R.Crim.P., was applicable to proceedings under P.L. 87-423. 117 U.S.App.D.C. at 173, 327 F.2d at 871, n. 18. But in Coleman II, two of the judges who subscribed to the majority opinion in Jones, Judge Burger and Judge McGowan, pointed out that a P.L. 87-423 motion should not be characterized as a motion for reduction of sentence. 334 F.2d at 568. Judge Burger and Judge McGowan held that to apply Rule 35 to the "resentencing" proviso would deny the defendant the right of allocution, since his presence is not required at a Rule 35 hearing. See ibid.; Rule 43, F.R.Crim.P. Their opinion indicates that the district court's power "to choose between the two available sentences" is properly invoked by "motion made pursuant to the amendatory Act," 334 F.2d at 567. It thus appears that at least five of the judges of this Court do not view the proceedings below as a Rule 35 motion for reduction of sentence.

The most applicable authority in determining whether the defendant bears the burden of persuasion is Andres v. United States, 333 U.S. 740 (1948). There the statute read that, "Every person guilty of murder in the first degree shall suffer death." A further provision added that, "the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life." 18 U.S.C.A. §§ 454, 567 (1927 ed.). Such language implied that the defendant carried the burden of obtaining a jury recommendation in favor of life imprisonment. But the Court held that capital punishment could not be imposed unless the jury unanimously determined against qualifying its verdict. The humanitarian purpose of the statute, to restrict capital punishment, led to this construction despite the implication of the statutory language standing alone. See id. at 748-49. "But in a matter of this sort judges do not read what Congress wrote as though it were merely a literary composition. Such legislation is an agency of criminal justice and not a mere document." Id. at 756 (concurring opinion of Justice Frankfurter).

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Unlike the statutory language construed in Andres, P.L. 87-423 does not even imply that the defendant has the burden of persuasion. Congress' humanitarian purpose was surely no less in 1962, when it repealed the mandatory death provision for the District of Columbia, than in 1897 when it repealed the mandatory death provision for federal jurisdictions generally.*/ It follows that the rule of construction applied in Andres would even more clearly preclude the placing of the burden upon defendant under P.L. 87-423. As the government has recently pointed out to this Court, "[In] a death case . . . doubts are normally resolved in favor of the accused. Andres v. United States, 333 U.S. 740, 752 (1948)." Memorandum of Appellee on rehearing, Frady and Gordon v. United States, Nos. 18,357-58 (appeals pending), pp. 17-18.

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*/ Consideration of the legislative history of the 1897 and 1962 statutes is presently pending before this Court en banc in Frady and Gordon v. United States, Nos. 18,357-58. The legislative history and purpose of the respective statutes is compared by the government in the Memorandum of Appellee on rehearing, pp. 3-9. A detailed legislative history of the 1962 statute is set forth in the Memorandum of Amicus Curiae on rehearing, Appendix III.

If this Court holds that the district court erroneously imposed the burden on defendant, then the order appealed from should be set aside. Further, appellant submits (in accord with the Introductory portion of the Argument, supra), this Court may apply to the record the correct rule governing the burden and thereby determine whether "the factors in aggravation outweigh those in mitigation".

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II. "CIRCUMSTANCES IN MITIGATION" WITHIN THE MEANING OF P.L. 87-423 INCLUDE FAVORABLE PROSPECTS FOR REHABILITATION, UNLIKELIHOOD OF RECIDIVISM, PREVIOUS GOOD REPUTATION IN THE COMMUNITY, AND MODEL POST-CONVICTION CONDUCT, AS WELL AS FACTORS THAT DISADVANTAGED THE ACCUSED, SUCH AS MENTAL RETARDATION AND CONDITIONS OF SOCIO-ECONOMIC DEPRIVATION

(Tr. 10, 17, 41-42, 82-85, 152-56, 160-61, 163, 182-88, 228, 232-34, 238-39)

A. Reputation, Rehabilitation, Recidivism and Post-Conviction Conduct

The district court found, with strong support in the record, that the following were among the facts established in the hearing below.

> "That [defendant's] mother enjoyed an enviable reputation in the county; second, that all members of the family, including the defendant, bear a good name among both the white and negro members of the community; and third, that the defendant had an unusually good reputation in Louisa County, that he had fine home training, and the offense for which he was convicted is in sharp contrast to what was known in Louisa County as his normal behavior pattern." (Op. pp. 4-5.)

The Court further found:

> "The total of the evidence reasonably supports the conclusion that the defendant has been a model prisoner. He is a fairly good influence on those who are around him. He would be a good risk for rehabilitation. The possibilities of recidivism are remote. He has adjusted well to prison life and would be a good influence to the prison community." (Op. pp. 8-9.)

This finding is strongly supported by uncontroverted evidence. E.g., the probation officer's report expressed the belief that appellant had "above average potential for rehabilitation." (Probation Officer's Memorandum to the Honorable Joseph C. McGarraghy, July 2, 1964, p. 2.) Chaplain Robey wrote:

> "During his stay in the Jail I have found Mr. Coleman to have a consistent attitude of regret and sober repentance over his crime. It is my belief that this sincere regret is based on the broader issues of right and wrong, rather than on the narrower matter of what is good for himself.
>
> I have seen this man mature in outlook and in understanding of himself, other inmates and the Jail personnel. He has borne the greater and smaller pressures of incarceration in a death row cell with a tolerance and acceptance which one cannot help admiring.
>
> * * *
>
> It is my personal belief that this man has grown in breadth and strength of character during this period of over four years to the point that he is not really the same person who committed the crime." (Letter to probation officer, June 29, 1964, annexed to probation officer's report; see also Tr. 41-42.)

Dr. Marland, consultant to the Department of Corrections (Tr. 229), called as a witness for the government, testified that:

> "This man makes an extremely good impression on me. Much better than I get from examining most of the folks that I see at the Jail. His record is good except for this incident.
>
> * * *
>
> He does not try to excuse himself.
>
> * * *
>
> He has been a model prisoner. Everyone that has seen him feels pretty much as I do, that this man is a fairly good influence on those who are around him.
>
> I think he would be a good risk for rehabilitation. I feel that he would get along better than usual in Jail.
>
> * * *
>
> The possibilities of recidivism are remote." (Tr. 238-39).

The government recognized that some of Dr. Marland's testimony "will undoubtedly be in mitigation" (Tr. 228).

Nevertheless, the Court concluded that none of the foregoing findings or evidence showed "circumstances in mitigation" within the meaning of the statute. This is apparent from the Court's reasoning in reaching the conclusion that life imprisonment should be denied:

> "The reports of the Chaplains of the adjustment which the defendant has made in the places of his confinement are encouraging and, if factors of a mitigating character were present, they would carry weight in resolving the issue. However, standing alone, his subsequent conduct in prison is not a circumstance in mitigation of punishment." (Op. 13-14; emphasis supplied).

Thus the Court did not interpret "circumstances in mitigation" of punishment as comprehending the facts found by the Court of favorable prospects for rehabilitation, unlikelihood of recidivism, or constructive contribution to the life of the prison community.

The Court even more decisively rejected the contention that defendant's previous good record and "unusually good reputation" constituted "circumstances in mitigation".

> "In my opinion, rather than mitigation, the fact that the defendant departed from the training which he had received from his mother and failed to live up to the reputation which he and the other members of his family enjoyed in their home community constitutes a factor more in aggravation than in mitigation." (Op. 13.)

Appellant submits that P.L. 87-423 should be construed to include each of the foregoing factors as a "circumstance in

mitigation". In Coleman II the Court observed that "the purpose of the proviso of the amendatory Act was directed to the possible existence of circumstances in mitigation, not of the crime, per se, but of punishment." 334 F.2d at 562 (emphasis in original; footnote omitted). The Court adopted the classic formulation of the Supreme Court in Williams v. New York, 337 U.S. 241, 247 (1949), that under "modern concepts individualizing punishment",

> "Highly relevant -- if not essential -- to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." (334 F.2d at 563.)

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*/ Further guidance on this question will be available when the Court renders a decision and opinion in the pending appeals of Frady and Gordon v. United States, 18,357-58, in which the considerations for jury determination of capital punishment under P.L. 87-423 are the subject of extensive briefing. In particular, part II of the Memorandum of Amicus Curiae contains an extensive discussion of the means of bringing pertinent information before the jury.

The implication is that, if the information "concerning the defendant's life and characteristics" is favorable, this Court would regard such information as showing "circumstances in mitigation" within the meaning of the statute. */

The Supreme Court in Williams v. New York, supra, indicated that in a judge's choice between a death and life sentence, the judge could properly rely on the circumstance that he found defendant a "menace to society", "a bad risk for society". Id. at 244, 252. The converse should follow: that a finding that defendant "would be a good risk for rehabilitation" and that "the possibilities of recidivism are remote" (Op. 8-9), are "circumstances in mitigation" of punishment. Indeed, the Supreme Court quoted with approval as a question to be resolved in sentencing:

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*/ The Court in Coleman II, at 562, n. 23, cited Couch v. United States, 98 U.S.App.D.C. 292, 235 F.2d 519 (en banc 1956), which dealt with procedural aspects of the defendant's right under Rule 32(a), F.R.Crim.P., "to present any information in mitigation of punishment." The dissenting opinion of Judge Miller and Judge Bastian in Couch implies that "hope of rehabilitation" is a circumstance "in mitigation of punishment" within the meaning of Rule 32(a). See 98 U.S.App.D.C. at 297, 235 F.2d at 524. The majority and concurring opinions do not indicate any contrary view on this point.

> "Is the criminal a man so constituted and so habituated to war upon society that there is little or no real hope that he ever can be anything other than a menace to society -- or is he obviously amenable to reformation?" Id. at 248, n. 13, quoting Glueck, Probation and Criminal Justice 113 (1933). */

The Court also indicated in Williams that defendant's numerous prior criminal acts were a factor properly supporting the trial judge's decision in favor of a death sentence. See id. at 244. The Court noted that, "Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders." Id. at 248 (footnote omitted). But in the instant case defendant's good prior record was not held to be a "circumstance in mitigation".

Appellant does not here contend that factors such as the foregoing can never be outweighed by "circumstances in aggravation" under P.L. 87-423. But in this case the favorable factors were not held to be "circumstances in mitigation" at all, let alone found to be outweighed by "designated" circumstances in aggravation".

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*/ The United States Attorney, in Senate hearings on the omnibus crime bill, noted as factors that should be considered in sentencing: "the age, character, and prior record of the defendant . . . personal factors making rehabilitation likely or unlikely . . . probability of recurrence of a similar crime. . . Hearings on H. R. 7525 and S. 486, 88th Cong., 1st Sess., Part 1, p. 61.

B. Mental Retardation

The Court below accepted the psychiatric testimony "that the defendant is mentally retarded." (Op. 12. See Tr. 10, 17, 232-34.) The Court found that, "Clinically, [defendant] has an IQ of about 71 and he is sub-normal intellectually, but at a level that functioned satisfactorily as a laborer and truck driver." (Op. 6.) Expert testimony indicated that persons of this intellectual level are more likely than the general population to commit homicide (see Tr. 152-56; Op. 6.) The Court found that, "With the IQ reading of 71, by reason of his sub-normal intellect, [defendant] might be expected to be suggestible and influenced by others for whom he has respect and admiration." (Op. 6.) The Court found that it was defendant's brother who suggested the idea of committing the robbery to defendant, and that defendant agreed to the suggestion and willingly participated. (See Op. 7, 14.) Even though defendant's sub-normal intellect caused him to be suggestible and influenced by others (Op. 6), the sub-normal intellect was not found to be a "circumstance in mitigation".

Appellant submits that the record shows that defendant's mental retardation at least made him more likely to become involved in the felony murder in this case than a person normally endowed. Appellant contends that the diminution of his ability to control his conduct (see Tr. 163) and to resist the suggestion to engage in the robbery, should be held a "circumstance in mitigation" within the meaning of the statute. This Court's opinion in Stewart v. United States, 107 U.S.App.D.C. 159, 166, 275 F.2d 617, 624 (1960), stated that "a majority of this Court are not now willing to adopt" the concept that the jury might consider a sub-normal intelligence level as evidence reducing the degree of homicide from first to second. "The basic framework for sentences of punishment must be established by the legislative branch." Ibid. The Congress has since enacted P.L. 87-423. It is not inconsistent with Stewart to interpret P.L. 87-423 as authorizing the more limited rule that mental retardation is to be regarded as one "circumstance in mitigation". Unlike the rule rejected in Stewart, this rule would not render the offense non-capital. A death sentence could still be imposed where mental retardation and other "circumstances in mitigation" were outweighed by the "circumstances in aggravation".

The evidence and finding as to whether a specific causal relationship was shown between appellant's condition of mental retardation and his commission of the felony murder are discussed under Point V - B, infra (pp. 66-68). But even assuming that such evidence were inadequate to establish a specific causal connection in this case, the evidence of a striking statistical correlation between the affliction of mental retardation and the commission of homicides (see Tr. 152-56) would show that the retardate, because of his handicap, has a greater chance than others of becoming involved in a capital offense. This lends support to the basic moral consensus, reflected in a recent report to the President, and itself a ground for recognizing retardation as a "circumstance in mitigation":

> "Of course, the punishment of death for mentally retarded persons is morally offensive." Report of Task Force on Law, President's Panel on Mental Retardation (1963), p. 39.

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C. Socio-Economic Deprivation

It was undisputed that defendant had been raised in conditions of rural poverty and limited opportunity, in Louisa County, Virginia. (See Post-Sentence Report, pp. 5-6; Report of Dr. Lanham, p. 1; Amended Motion for Imposition of Sentence of Life Imprisonment, par. 12; Tr. 284-86.) The Court found that, in order to obtain permanent employment, young men such as defendant had to migrate from Louisa County (Op. 4). There was expert testimony that socio-economic and cultural deprivation was probably a cause of defendant's mentally retarded condition (see Tr. 17, 160-61). This alone would warrant recognition of appellant's socio-economic deprivation as a "circumstance in mitigation".

In addition, the expert testimony indicated that a very high proportion of persons capitally punished come from among the poor and underprivileged -- "not only poor in material possessions but in background, education and mental capacity as well." (Tr. 183; see Tr. 182-88; Def. Ex. 5.) The testimony further indicated that Negroes were more likely than whites to be included among the socio-economically deprived

(see Tr. 84-85, 160-61, 184)*/ and hence more likely to incur capital punishment. In appellant's view, the showing that capital punishment in our society is imposed almost exclusively upon members of deprived groups, raises a serious question of equal protection of the laws under the Fifth Amendment. A partial answer to this question would be to treat inequality of social and economic opportunity as one "circumstance in mitigation" under the statute -- albeit one that may be outweighed by "circumstances in aggravation".

The Court apparently rejected socio-economic deprivation as a "circumstance in mitigation" on the ground that, "There is competent and convincing testimony in this case that this circumstance does not provide a reasonable medical or psychiatric explanation for the offenses of which the defendant was convicted." (Op. 13.) Assuming that the record supports

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*/ Appellant is a Negro. However, appellant did not contend, as the opinion appears to imply (Op. 13), that "the fact that defendant is a Negro" is a "circumstance in mitigation". Rather, appellant contended that Negroes are more likely to encounter socio-economic deprivation (see Tr. 82-85, 160-61, 183-88). It is the deprivation, not the race of the deprived, that appellant contends should be considered a "circumstance in mitigation".

this view (notwithstanding the psychiatric testimony that deprivation contributed to appellant's mental retardation), the Court's reading of the statute is too narrow. Appellant submits that "circumstances in mitigation" should not be construed as limited to those which "provide a reasonable medical or psychiatric explanation for the offenses". This Court in Coleman II indicated a broader view of the relevance of socio-economic deprivation to the choice between a life and death sentence. The Court there stated, in discussing the applicable considerations under P.L. 87-423: "Supplementing our earlier references herein to considerations open to the judge, see . . . note 'Executive Clemency in Capital Cases,' 39 N.Y.U.L.Rev. 136, 166 (1964)." (Coleman II at 563, n. 25.)

The cited page states:

> "The importance of the pre-sentence report is that it might reveal a background of social deprivation, recognized by most clemency authorities as another facet of the mitigation standard." 39 N.Y.U.L.Rev. at 166.

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III. THE LACK OF FINDINGS OF "CIRCUMSTANCES IN AGGRAVATION" PRECLUDES A CONCLUSION THAT A DEATH SENTENCE IS PROPER UNDER THE TERMS OF P.L. 87-423

(Tr. 4, 263-64, 274.)

The legislative intent was, as noted above (pp. 20-21), that the resentencing judge determine whether "the factors in aggravation outweigh those in mitigation," or "the factors in mitigation outweigh those in aggravation". H. R. Rep. No. 677, supra.

Whether or not this Court accepts appellant's contention in point I regarding the allocation of the burden of proof, appellant submits that the resentencing judge must under the applicable rule at least find what the "factors in aggravation" are, and weigh these against the "factors in mitigation". Accordingly, appellant requested that the Court below make specific findings "as to what are the factors in mitigation in this case and what if any are the factors in aggravation." (Tr. 274; see Tr. 4, 263-64.)*/ Cf. Rule 23(c), F.R.Crim.P.;

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*/ In the instant case the government took no position on this request. Previously, upon the remand in Jones, the government took the position before Judge McGarraghy that "this Court need not make findings as to circumstances in mitigation and aggravation." United States v. Jones, Cr. No. 843-58, "Government's Memorandum on the Court of Appeals Opinion Dated September 13, 1963 in Willie Jones v. United States of America, No. 17,845," at n. 5.

Cesario v. United States, 200 F.2d 232, 233 (1st Cir. 1952) (Rule 23(c) "indicates the proper procedure by which a defendant may preserve a question of law for purposes of appeal"*/); Michener v. United States, 177 F.2d 422, 424 (8th Cir. 1949).

The opinion, which constituted the Court's findings of fact and conclusions of law (Op. 15), with one exception does not make any finding that a particular factor or circumstance constituted a "circumstance in aggravation". Thus there is no basis (unless the single exception noted is sufficient) for holding that the Congressional mandate has been satisfied: "If the factors in aggravation outweigh those in mitigation, [the judge] shall impose a sentence of death by electrocution." H. R. Rep. 677, supra; Jones, supra, at 877 (concurring opinion). Here the sentence of death by electrocution has been chosen without the requisite findings.

The single exception to the above-noted absence of aggravating circumstances appears in the Court's conclusion:

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*/ Appellant does not contend that Rule 23(c) applies to post-trial proceedings, but suggests that essentially the same procedure should be followed under P.L. 87-423.

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> "In my opinion, rather than mitigation, the fact that the defendant departed from the training which he had received from his mother and failed to live up to the reputation which he and the other members of his family enjoyed in their home community constitutes a factor more in aggravation than in mitigation." (Op. 13.)

Appellant submits that the statute should not be construed to make a previous good reputation work against a defendant, to aggravate rather than mitigate his punishment. Traditionally, good reputation is a factor in the defendant's favor in sentencing decisions. See e.g., ALI Model Penal Code § 7.01(2)(g) (Proposed Official Draft, 1962). But even if the district court be upheld in interpreting this factor as one "in aggravation", within the meaning of P.L. 87-423, appellant contends that this is totally insufficient to outweigh the evidence of "factors in mitigation" presented by this record, and summarized in other points of this brief.

IV. THE COURT SHOULD HAVE GIVEN WEIGHT TO THE PRE-TRIAL STATEMENTS, FIRST PRODUCED AT THE HEARING BELOW, WHICH CONTRADICTED IN A CRUCIAL RESPECT THE TRIAL TESTIMONY OF THE GOVERNMENT'S SOLE EYEWITNESS TO THE HOMICIDE (Tr. 69-72, 74, 109, 214-24.)

The probation officer's report, in describing the circumstances of the offense, included the following:

> "According to a statement given detectives by Winters on January 8, 1960: 'I had my gun in my hand and I pointed it at him and said this is the police, put your hands up. The man had one hand in his pocket and made a movement as if to pull his hand out of his pocket, either to pull a gun or to raise his hands. At this time Brereton came down the alley, on the east side and apparently did not see me pointing my gun and holding him at bay. He walked between me and this colored man. I hollered at him and Brereton stopped directly in front of him and the man grabbed him. They wrestled for about half a minute, then I heard a shot and Brereton fell to the ground. I pointed my gun at the man, he fired one shot at me, which took effect and I fired one shot at him, then fell to the ground. After falling to the ground I heard another shot. I rolled over and looked down the alley and saw this man running south. I fired two or three more shots at him as he ran . . .'" (Post Sentence Report, p. 2; emphasis supplied.)

This report was made available to defendant on July 7, 1964. (See Order of July 13, 1964.) The statement itself was produced during the hearing below, pursuant to the

Court's ruling (see Tr. 72, 74, 216), and was received in evidence as Defendant's Exhibit 8 (see Tr. 215-21).*/ Defendant's pre-trial motion for production of statements of Winters had been denied (JA 26, par. 1; JA 29). Defendant's trial counsel did not request production of statements under the Jencks Act (18 U.S.C. § 3500) at the conclusion of the direct examination of Winters, or of any other government witness.

The verdict finding appellant guilty of felony murder turned on the resolution of a close and sharply controverted question of fact: whether defendant had surrendered to Officer Winters prior to the homicide. This Court held in Coleman I that this factual issue had been submitted to the jury, under proper instructions, and resolved by the jury against appellant.

The critical importance of this issue at trial appears from the circumstance that the government called as its sole rebuttal witness Officer Winters, to controvert appellant's testimony (JA 343, 350) that he was raising both his hands to surrender. Winters' rebuttal testimony was the last evidence that the jury heard.

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*/ The defendant also introduced in evidence Exhibits 9 and 10, containing other pre-trial statements of Winters contradictory to his trial testimony concerning the events in the alley immediately preceding the homicide. (See Tr. 220-23.)

"BY MR. FLANNERY:

Q. Private Winters, when you pursued one of the robbers down the alley, as you have previously testified, and told him that you were a policeman, and pointed your gun at him, did he raise both hands in the air, like this? (Demonstrating). A. No, sir.

Q. Now, did he take -- where were his hands? A. His hands were in his pocket.

Q. And when you pointed your gun at him what did he do? A. When -- I pointed the gun at him and said I was a police officer.

MR. WHITLOCK: If the Court please, this witness has already answered these questions on direct examination and is just repeating previous testimony. We object.

THE COURT: This is rebuttal.

MR. WHITLOCK: He has already answered it on direct examination. The very same question and the very same answer.

THE COURT: Objection overruled.

THE WITNESS: I pointed my revolver at him, stated I was a police officer, and to put his hands up. The defendant had both of his hands in his pockets. He took his left hand out of his pocket and put it at his side. It was at that time that Officer Brereton ran in between us." (JA 373; emphasis supplied.)

The statement of Winters contained in Defendant's Exhibit 8 was given to Lt. Daly on January 7, 1960 -- the night of the homicide.*/ At that time Winters could not have known, and the police did not know, that appellant had been unarmed at the time that Winters cornered him in the alley and told appellant to raise his hands. That fact was not learned until at least January 9 (see JA 107-118; Coleman I, 111 U.S.App.D.C. at 217, 295 F.2d at 562, n. 25). Winters' January 7 statement, that appellant had one hand in his pocket, and that appellant "made a movement as if to pull this hand out of his pocket, either to pull a gun or to raise his hands", appears in the light of later knowledge that appellant was unarmed, to confirm appellant's testimony that the movement was "to raise his hands." Had this statement been used to impeach Winters' testimony before the jury, they might not have accepted beyond a reasonable doubt Winters' later version that defendant had both hands in his pockets, and removed only one hand and put it at his side (JA 373; see also JA 50, 56, 61).

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*/ The probation officer's report, quoted supra, dates the statement as January 8. January 8 is the date on Lt. Daly's typewritten report containing the statement; but the heading of the report shows that the statement was given at Daly's interview with Winters at the hospital on January 7. (See Def. Ex. 8.)

Appellant submits that, under the Supreme Court's decision in Brady v. Maryland, 373 U.S. 83 (1963), followed and applied by this Court in Ellis v. United States, __ U.S.App. D.C. __, __ F.2d __ (No. 18,424, Feb. 25, 1965), the government had an obligation to produce before or at trial Defendant's Exhibit 8. See also Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964). Particularly in a capital case, failure to request the statement under the Jencks Act should not have excused its non-production. Moreover, here as in Brady defendant's counsel had made a request for such statements prior to trial (JA 26). At the least, appellant submits, the government should not have put Winters rebuttal testimony before the jury without furnishing the defense a copy of a prior statement tending to exculpate defendant. See Brady v. Maryland, supra; cf. Napue v. Illinois, 360 U.S. 264 (1959).

It may be argued that on this record the Court below could have ruled that non-production of Exhibit 8 should be deemed harmless error, on the ground that Lt. Daly had given a similar recital of Winters' account in Daly's testimony before the Coroner's Inquest (JA 21-22), and that the defense could have made more effective use of Daly's Inquest testimony for

cross-examination and impeachment of Winters (see JA 49-50). However, Winters testified that his words to Daly were: "The man had both his hands in his pockets. The man took his left hand out of his pocket. He didn't take his right hand out of his pocket." (JA 50.) Exhibit 8 contains a direct contradiction subscribed by Daly of this testimony of Winters. It cannot be said with assurance that Exhibit 8, if available at trial, would not have been used to impeach Winters' testimony on this issue.*/ In non-capital cases the test of harmless error for statements not produced under the Jencks Act is very strict. Rosenberg v. United States, 360 U.S. 367 (1959). The standard should be still harder for the government to satisfy in a capital case.

Even if it be held that the statement would have had no effect on the jury's verdict, or that defendant waived his right to the statement at trial, Exhibit 8 was still germane to the issues under P.L. 87-423. The government, both in its Answer to Motion for Reduction of Sentence (JA 427), and in its oral argument before Judge McGarraghy on the first sentence hearing (JA 439), relied on Winters' testimony that appellant had removed only his left hand from his pocket and put that hand

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*/ Winters' claim that he had told Daly that appellant had both hands in his pockets also appears inconsistent with Def. Ex. 9, a statement to Daly subscribed by Winters. There Winters said that he had observed appellant "with his back against the wall and his right hand in his overcoat pocket."

at his side. Exhibit 8 controverts the government's allegation, and is evidence that should have been considered by the Court below in determining whether the circumstances of the offense included "circumstances in mitigation". Appellant submits that Winters' statement in Exhibit 8 at least raised a doubt, for purposes of the sentence determination proceeding, that appellant was guilty in fact of a felony murder. The opinion below does not reject the factual or legal basis of this argument; with respect to Exhibit 8 the opinion is silent.

Appellant contends that the doubt of guilt which the statement raises, as well as the possible effect of its absence on the verdict, should be held a "circumstance in mitigation" within the meaning of P.L. 87-423. Compare the Model Penal Code provision, which excludes a sentence of death for murder in the situation where, "although the evidence suffices to sustain the verdict, it does not foreclose all doubts respecting the defendant's guilt." ALI, Model Penal Code § 210.6(1)(f) (Proposed Official Draft, 1962). In construing P.L. 87-423 in Coleman II, this Court held that the considerations appropriate under the proviso are as broad as those which are open to the jury under the federal discretionary death statute interpreted in Winston v. United States, 172 U.S. 303 (1899).

> "The judge . . . is to consider . . . 'any other consideration whatever' which 'should be allowed weight in deciding the question whether the accused should or should not be capitally punished.' Winston v. United States, supra . . . , 172 U.S. at 313, 19 S.Ct. at 215; Jones v. United States, supra". Coleman II at 562, n. 22.

Failure of the evidence to "foreclose all doubts respecting the defendant's guilt" is certainly an appropriate consideration "in deciding the question whether the accused should or should not be capitally punished." (See Tr. 109.) The Supreme Court expressly included among the factors appropriate for the jury's consideration at the time of trial: "the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light". Winston, supra, at 313, quoted in Jones, supra, at 878 (concurring opinion). Exhibit 8 creates that apprehension in this case.

V. THE COURT ERRED IN HOLDING THAT SUBSEQUENT JUDICIAL DECISIONS, WHICH MIGHT SHOW THAT APPELLANT'S CONVICTION RESTED UPON UNLAWFULLY OBTAINED EVIDENCE OR FAILURE TO INVOKE A VALID INSANITY DEFENSE, WERE IRRELEVANT TO THE DETERMINATION OF SENTENCE UNDER P.L. 87-423

(Tr. 10-19, 33, 145, 152-62, 174, 188-92, 206-14, 231-34, 239-42)

A. Decisions on Admissibility of Confessions

In his amended motion following the remand, defendant asserted that subsequent judicial decisions in other cases, post-dating the affirmance in Coleman I, indicated defendant's conviction might have been erroneous. (Amended Motion for Imposition of Sentence of Life Imprisonment, par. 27.)*/ At the hearing below, appellant set forth in detail the subsequent judicial opinions on which he relied, and the manner in which

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*/ This contention, based solely on subsequent cases, was distinct from the contention raised in the original motion and rejected in Coleman II: that the dissents in Coleman I in this Court and the Supreme Court created a doubt as to the legal correctness of defendant's conviction in the absence of an instruction on murder in the second degree. Coleman II, at 561-62, held that the affirmance of the conviction had settled this issue.

these indicated that there had been error, some of constitutional dimension, in appellant's trial. (See Tr. 206-13).

Appellant urged below, and urges here, that the confession of the co-defendant, Raymond Coleman, which extensively implicated appellant, had been admitted under the established procedure subsequently held unconstitutional in Jackson v. Denno, 378 U.S. 368 (1964). The Supreme Court there held violative of due process the established New York procedure for determining admissibility of an allegedly involuntary confession, where the facts concerning voluntariness are in dispute. Both majority and dissenting opinions in Jackson classify the District of Columbia procedure on this matter as like that of New York. See id. at 400; 403, 414-15. The same confession of Raymond Coleman would also have been inadmissible under interpretations of the Mallory rule in later cases. See, e.g., Greenwell v. United States, __ U.S.App.D.C. __, 336 F.2d 962 (1964), and cases there cited at 966. Both Greenwell at 968-69, and Jones, Short and Jones v. United States, __ U.S. App.D.C. __, __ F.2d __ (Nos. 17,688-92, en banc, July 16, 1964), slip op. at 7-10, establish that appellant would have standing on appeal to assert the erroneous admission of his co-defendant Raymond's confession.

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Appellant's own self-incriminatory statement, used against him in cross-examination (see JA 353-54; cf. JA 262), and used in the prosecutor's summation to attack the credibility of appellant's version of the homicide (Trial Transcript 1064-65), appears to have been obtained in violation of his Sixth Amendment rights as interpreted in Escobedo v. Illinois, 378 U.S. 478 (1964). In Escobedo, the defendant had been questioned in the absence of counsel after he "had, for all practical purposes, already been charged with murder." Id. at 486. In the instant case, defendant's situation was even clearer. The statement was obtained during his interrogation on January 9, 1960, whereas on January 8 he had been named as a first degree murder defendant in a petition to commit material witnesses (JA 16). Although appellant did not affirmatively request counsel, as had Escobedo, under the circumstances of this case appellant submits that no meaningful waiver can be implied (see Tr. 14). See People v. Dorado, 398 P.2d 361, 33 Law Week 2415 (Cal. 1964), petition for cert. filed, 33 Law Week 3338 (1965); People v. Stewart, 33 Law Week 2544 (Cal. 1965).

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After appellant had obtained counsel, a further violation of Sixth Amendment rights was accomplished. Lt. Daly questioned defendant and his brother, in the absence of their assigned counsel, immediately following their appearance before the committing magistrate. (See JA 251-52, 266-72.) Lt. Daly conceded that he had not received permission from either defendant's counsel to talk with defendants at that time (JA 266). The practice followed by Lt. Daly has since been held invalid by this Court in Ricks v. United States, __ U.S.App.D.C. __, 334 F.2d 964 (1964), and Queen v. United States, __ U.S.App.D.C. __, 335 F.2d 297 (1964). See also Massiah v. United States, 377 U.S. 201 (1964).

The Court below held that it was inappropriate in the proceeding on sentence to speculate on the impact of judicial decisions post-dating affirmance of appellant's conviction. (Op. 10-11.) Appellant submits that the district court should have ruled on whether the later authorities altered in appellant's favor the law as understood and applied at the time of trial. If the Court ruled in appellant's favor in that respect, the doubt thus raised as to the validity of appellant's

conviction should have been deemed a "circumstance in mitigation". One of the considerations against capital punishment is that it denies the recourse, always open to the life prisoner, to show that a new judicial light cast on the Constitution entitles him to his liberty. (See Tr. 188-92.) As noted above, "the irrevocableness of an executed sentence of death" is one of the appropriate considerations under the statute (see p. 58, supra). The possibility of legal error, no less than of factual error, being revealed after affirmance, should be embraced within this criterion.

This Court has observed that it has the power, in unusual circumstances, to recall a prior judgment, reinstate the appeal and reconsider the case in the light of intervening decisions of this Court. See Dykes v. United States, __ U.S.App. D.C. __, __ F.2d __ (No. 18,861, Feb. 19, 1965), slip op. at 3 (dissenting opinion of Judge Fahy); Turberville v. United States, 112 U.S.App.D.C. 400, 410, 303 F.2d 411, 421 (1962). Since this Court would thus have power to avert appellant's death sentence, if it felt that intervening decisions showed that the decision in Coleman I had been erroneous, appellant submits that the more limited remedy of considering intervening decisions as a "circumstance in mitigation" would be proper under P.L. 87-423.

B. The McDonald Decision

No insanity defense was raised at appellant's trial, which took place before this Court's en banc decision in McDonald v. United States, 114 U.S.App.D.C. 120, 312 F.2d 847 (1962). Appellant had received a pre-trial mental examination, on motion of the government (JA 23), by Dr. Cushard and Dr. Owens of St. Elizabeth's Hospital. Dr. Cushard and Dr. Owens each submitted to the United States Attorney a conclusory report, which was filed with the Court, stating that appellant "was not suffering from mental disease or mental defect" at the time of the offense; and each reported that appellant was "dull normal" in his intelligence (JA 29-30). The reports did not mention any IQ score, nor allude to the psychological tests which had been performed at Dr. Cushard's request by Dr. Margaret Mercer of St. Elizabeth's Hospital. Dr. Mercer's report, which was furnished to the United States Attorney in February of 1960 (Tr. 33), is now in the record as Defendant's Exhibit 1 at the hearing below. Her report found from psychological tests that appellant's IQ was 71 and that, "An IQ of 71 puts Mr. Coleman's functioning between the dull normal and frankly defective groups in that intelligence classification described as borderline."

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Her report further stated that, "This is a man who is unlikely to be able to exert judgment and control when he experiences emotional pressure. He is dull, immature, and likely to be easily influenced." (Def. Ex. 1.)

In McDonald the Court for the first time defined "mental defect" as used in the Durham test. It held that an insanity defense sufficient to go to the jury was raised by testimony of a psychiatrist and a psychologist "that the defendant had a 'mental defect', principally because his IQ rating shown by various tests was . . . 68"; and testimony by the psychologist (who happened to be Dr. Mercer) "that a person suffering from a mental defect would have less ability than normal persons to distinguish between right and wrong in complex situations . . . would tend to act impulsively under stress . . . and would readily become dependent upon and be strongly influenced by someone who befriended him", 114 U.S.App. D.C. at 122-123, 312 F.2d at 849-50.

Appellant submits that the report of Dr. Mercer (Def. Ex. 1) and the psychiatric testimony at the hearing below furnished evidence which would be sufficient, if adduced at a

trial, to raise an insanity defense for jury consideration under McDonald.*/ Appellant had an IQ rating of 71, as tested by Dr. Mercer (Def. Ex. 1), and confirmed clinically by Dr. Barnes, Dr. Marland, and Dr. Lanham (Tr. 10, 232-34; Report of Dr. Lanham). There was psychiatric testimony that appellant's mental deficiency had existed from birth (Tr. 17), and that the question of organic brain damage could not be finally resolved without an autopsy (see Tr. 161-62).

The Court below found no showing of a causal connection between appellant's retardation and his offense.

> "The testimony of the psychiatrists is that defendant is mentally retarded. . . . Accepting the psychiatric testimony for the purpose of this motion, there is no evidence in this case of any causal connection between his mental condition and the crimes which he committed." (Op. 12.)

At a trial, the evidence of "mental defect" having been shown, the issue of causation would be for the jury, under the usual rule governing burden of proof. See McDonald, supra, 114 U.S.App. D.C. at 123, 312 F.2d at 850.

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*/ Pre-McDonald decisions had suggested that an IQ score in the high 60s was not an evidentiary basis for an insanity defense. See Moore v. United States, 107 U.S.App.D.C. 332, 277 F.2d 684 (1960); Turberville v. United States, 112 U.S.App. D.C. 400, 410-11, 303 F.2d 411, 421-22 (1962) (concurring opinion).

The evidence of a causal connection between the retardation and the homicide was far stronger here than in McDonald. A leading expert on mental retardation, Dr. Brown, not only demonstrated from the most current research a striking correlation between mental retardation and commission of homicides in general (see Tr. 152-56). Dr. Brown's testimony further showed that appellant's condition of mental retardation contributed to each of the factors that the psychiatrists who had examined appellant found causally related to the felony murder:

(1) Mental retardation increased appellant's susceptibility to entering a panic state, in which the homicide was committed. (See Tr. 156-57, 174; 10-11, 16-17; 231; Report of Dr. Lanham, p. 2.)

(2) It made appellant easily influenced by others, including his brother who suggested the robbery. (See Tr. 157-58, 174; 10-14, 18; 240-41; Op. 7.)

(3) Mental retardation both contributed to and heightened the effect of appellant's excessive use of alcohol, which in turn had weakened his behavior controls at the time of the robbery and homicide. (See Tr. 158-59, 174; 12, 19; 231-32, 239; Report of Dr. Lanham, p. 2.)

It is not clear to what testimony the Court referred in concluding, "there was competent and compelling testimony" negating a causal connection between the retardation and the crime. (Op. 12.) But insofar as the Court was referring to Dr. Marland, his experience in the field of mental retardation was limited (see Tr. 241-43) and could not be deemed comparable to Dr. Brown's (see Tr. 145).

Had defendant been tried after the McDonald decision, or had Dr. Mercer's report been filed with the Court along with the reports of Dr. Owens and Dr. Cushard,*/ appellant might have been acquitted by the jury on the ground of insanity, because of a reasonable doubt whether the homicide was caused by a mental defect. This possibility that appellant was and is not guilty by reason of insanity of the capital offense for which he stands convicted, appellant submits should be deemed a "circumstance in mitigation" within the meaning of P.L. 87-423.

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*/ If the government had felt that the report had legal significance to an insanity defense under the law as it then existed, it would have been obligated to produce the report for the defense. See Ashley v. Texas, 319 F.2d 80 (5th Cir.), cert. denied, 375 U.S. 931 (1963).

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VI. THE COURT BELOW, ALTHOUGH RESTING ITS DECISION ON A DETERRENT THEORY, ERRONEOUSLY EXCLUDED FROM CONSIDERATION THE EXTENSIVE EVIDENCE IN THE RECORD THAT CAPITAL PUNISHMENT WAS NOT A DETERRENT TO HOMICIDES OR TO FATAL ATTACKS UPON POLICE OFFICERS

(See Tr. 41-42, 75-123, 130-38, 243-63.)

The Court's opinion notes:

"Counsel for the defendant offered much testimony by distinguished experts in the fields of sociology and civil rights to the effect that the imposition of capital punishment does not serve as a deterrent to the commission of homicides in general or deter fatal attacks on police officers . . . ." (Op. 9.)

The Court thus found -- and it would probably be generally acknowledged -- that the testimony of Professor Thorsten Sellin concerning deterrence (Tr. 75-123, 133-38) was from a distinguished and highly qualified expert. The Court did not find that his testimony lacked probative force, or that evidence adduced by the government on this issue (see Tr. 130-33, 243-63), refuted Professor Sellin. Nevertheless, the Court held that the testimony was not pertinent to its decision because the merits of such testimony are "a matter for the legislature and not for the Court." (Op. 9.)

Defendant submits that testimony of this calibre, to show that capital punishment in this case would accomplish no deterrent purpose, is evidence which "'should be allowed weight in deciding the question whether the accused should or should not

be capitally punished.'" Coleman II at 562, n. 22, quoting Winston v. United States, supra, at 313. If it were accepted that taking appellant's life would in no way protect another's, this would argue in favor of mitigating appellant's punishment. Compare Chaplain Robey's testimony that appellant "would have the possibility under a life sentence of making the kind of contribution to other inmates by his example and his influence that might really in one sense be a deterrent to this type of crime" (Tr. 41-42).

But even if the evidence on deterrence would not otherwise have been entitled to consideration under P.L. 87-423, it was made pertinent by the Court's adoption of a deterrent theory as a basis for its decision. Both in its pre- and post-remand opinions, the Court acted on the expressed view that, "the public interest, both from the point of view of deterrence and of punishment, requires that the penalty" be death for a criminal who kills a police officer. (JA 446; Op. 14.) The testimony of Professor Sellin, designed to show that capital punishment does not deter homicides of police officers (see Tr. 89-96, 98-99, 116-18, 121-22), was directed to meeting the opposite view expressed in the Court's pre-remand opinion.

For the Court to reiterate that opinion, while at the same time holding that its basis "is a matter for the legislature and not for the Court", was error.

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VII. ON THIS RECORD A DEATH SENTENCE WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment guarantee against cruel and unusual punishment "is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-101 (1958).

The record in this case poses the fundamental question: in a jurisdiction which for almost a decade has not employed capital punishment (Def. Ex. 7, Table 3); in a country which is largely ceasing to employ it (id.; Tr. 78-79); where a homicide has been committed, unintentionally, by a mentally retarded individual who acted out of fear that his own life was in danger (Point II-B and p. 10, n., supra); where this individual has been found to have a good prior record and excellent prospects for rehabilitation and avoidance of recidivism, if sentenced to life imprisonment (Point II-A, supra); where the individual comes from deprived and disadvantaged groups that almost exclusively provide the subjects for

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present-day capital punishment (Point II-C, supra)*/; where the record shows that there is no evidence that his capital punishment would deter capital crimes by others (Point VI, supra) -- is his execution barred by "the evolving standards of decency that mark the progress of a maturing society"?

Opinions of the Supreme Court and its Justices have in effect divided the question of whether a punishment is cruel and unusual into three major issues. (1) Whether it is disproportionate in its severity. See Weems v. United States, 217 U.S. 349, 371 (1910); Rudolph v. Alabama, 375 U.S. 889, 891 (1963) (opinion of Justice Goldberg, joined by Justice Douglas and Justice Brennan, dissenting from denial of certiorari); Robinson v. California, 370 U.S. 660 (1962), and especially the concurring opinion of Justice Douglas at 676-77.

(2) Whether in light of the "evolving standards of . . . a maturing society", the punishment is unusual, i.e., no longer justifiable. Trop v. Dulles, supra, at 100-101. Cf. Louisiana ex rel Francis v. Resweber, 329 U.S. 459, 469-70 (1947)

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*/ This aspect of the argument may also be characterized as one that, on the present record, capital punishment would also amount to a denial of equal protectionof the laws, which violates the due process clause of the Fifth Amendment (see Brief for Appellant in Coleman II, point II).

(concurring opinion of Justice Frankfurter); Bickel, The Least Dangerous Branch 107-08 (1963). But see Trop v. Dulles at 99: "in a day when it is still widely accepted, [the death penalty] cannot be said to violate the constitutional concept of cruelty." (3) Whether, in light of the proper aims of punishment, it entails "unnecessary cruelty". See Rudolph v. Alabama, supra, at 891 (1963) (opinion dissenting from denial of certiorari), quoting Weems v. United States, supra, at 370.

Appellant need not go so far as to contend that capital punishment is per se unconstitutional, regardless of the nature of the offense and the offender. Appellant does contend that, on the instant record, each of the three foregoing issues should be resolved in favor of holding that execution of this appellant would constitute cruel and unusual punishment.

(1) No value of human life is protected by executing appellant. Rudolph, supra, at 891, suggests that this should be the test of whether the death sentence is a disproportionate punishment. On this record it was proven and found that appellant, if permitted to live, is extremely unlikely to repeat his offense. (See Point II-A, supra). The testimony of the leading student of capital punishment showed that no relationship can be established between the retention of capital punishment, and the deterrence of other capital offenses. (See Point VI).

(2) The record shows that capital punishment for homicide in the United States has been declining for almost thirty years, and reached an all-time low in 1963, the latest year for which figures are available. (See Tr. 78-79; Def. Ex. 7 ("National Prisoner Statistics, Executions 1930-1963")). In 1963, twenty-one persons were executed in the United States, eighteen for murder. This represented less than one execution per four hundred wilful homicides (see Tr. 78-79, 203-06). The last execution in this jurisdiction was in 1957. (Def. Ex. 7, Table 3.) Subsequent to 1957, there has been but a single execution in any federal jurisdiction (this being for kidnapping) and none in this jurisdiction. (Def. Ex. 7, Table 3 and p. 3.) Numerous prosecutions for first degree murder have been brought in this jurisdiction since 1957 -- indeed the number has increased since repeal of the mandatory death penalty (see Gov. Exs. 1 and 2). There have of course continued to be convictions, but not executions. At the time that Congress repealed the mandatory death sentence, seven persons were under sentence of death; only this appellant has remained so (see Brief for Appellant in Nos. 17,176-77, 68, n. 29a). At least in

federal jurisdictions it cannot today be said that capital punishment "is still widely accepted", Trop v. Dulles, supra, at 99. To reinstitute the practice of capital punishment in this jurisdiction, in the face of its widespread abandonment would run counter to "the progress of [our] maturing society". Rudolph v. Alabama, supra, at 890, quoting Trop v. Dulles, supra, at 101.

(3) The record in this case establishes that "the permissible aims of punishment" mentioned in Rudolph, supra, at 891 -- "deterrence, isolation, rehabilitation"*/ -- can be achieved by life imprisonment not only as effectively but more effectively than by capital punishment. The only aim of punishment which on this record capital punishment may be said to serve is the aim of retribution. "Retribution is no longer the dominant objective of the criminal law." Williams v. New York, 337 U.S. 241, 248 (1949).

Execution of this appellant, deprived and mentally retarded, yet demonstrably capable of rehabilitation, remorse and a constructive contribution to his society, we submit would be a punishment of "unnecessary cruelty".

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*/ See also Williams v. New York, 337 U.S. 241, 248, n. 13 (1949), which states an additional aim: "the punishment -- or much better -- the discipline of the wrong-doer."

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CONCLUSION

For the foregoing reasons, appellant respectfully prays that the order of the Court below be reversed, and the case remanded with directions to impose a sentence of life imprisonment.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,193

WILLIAM C. COLEMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ALFRED HANTMAN,
JEROME NELSON,
Assistant United States Attorneys.

Cr. No. 163-60

QUESTIONS PRESENTED

1. Whether the Court improperly placed a burden of proof or persuasion on appellant.

2. Whether the Court was arbitrary and capricious in rejecting arguments to the effect that the imposition of the death penalty would have no deterrent effect, where the same arguments were made to Congress which decided against abolition of capital punishment.

3. Whether the Court was arbitrary and capricious in finding that the factors of mental retardation and social deprivation were not circumstances in mitigation in this case.

4. Whether it was arbitrary and capricious for the Court to refuse to speculate as to the impact of subsequent judicial decisions on appellant's 1960 trial, where these decisions were urged in mitigation.

5. Whether it was arbitrary and capricious for the Court to reject a prior inconsistent statement of a government witness, not utilized at trial, as matter in mitigation.

6. Whether on the facts of this case the imposition of the death penalty upon a murderer constitutes cruel and unusual punishment.

7. Whether circumstances in aggravation, although not so labelled in the Court's opinion, are clearly apparent therein.

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TABLE OF CASES

OTHER REFERENCES

United States Court of Appeals

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UNITED STATES OF AMERICA, APPELLEE

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---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In June of 1960, a jury convicted appellant of first degree murder and he was sentenced to death under the then mandatory death provision of 22 D.C.C. 2402 (1961 Ed.). His conviction was affirmed by this Court *en banc* in September of 1961. *Coleman* v. *United States*, 111 U.S. App. D.C. 210, 295 F.2d 555 (1961), *cert. denied*, 369 U.S. 813, *rehearing denied*, 369 U.S. 842.

On March 22, 1962, Congress amended the homicide law of the District of Columbia, establishing a procedure whereby in certain circumstances death sentences imposed under the old law might be reduced to life imprisonment. Appellant filed motions seeking such relief under the new Act. In June of 1962 these motions were

denied by the District Court (McGarraghy, J.). In May of 1964 this Court reversed that determination, holding that an evidenciary hearing should have been conducted in the District Court wherein circumstances of aggravation and mitigation could be developed. *Coleman* v. *United States*, 118 U.S. App. D.C. 168, 334 F.2d 558 (1964).

The hearing directed by this Court took place on October 5, 6, and 7 of 1964 before Judge McGarraghy. Appellant presented numerous witnesses and made extensive argument. Other evidence was considered by way of stipulation and much documentary evidence was also submitted. Everything offered by appellant was heard by the Court. The government took no adversary position with reference to the actual choice of punishment to be imposed (Tr. 3-4, 228).

On January 8, 1965, the Judge issued a 15 page memorandum concluding that in his opinion the case did not justify a sentence to life imprisonment.*

Other pertinent facts appear in the respective sections of the Argument, *infra.*

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Eighth Amendment to the Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor curel and unusual punishment inflicted."

The Act of March 22, 1962, 76 Stat. 46, as codified in 22 D.C. Code 2404 (Supp. IV, 1965), provides in pertinent part as follows:

> "Cases tried prior to March 22, 1962 and which are before the court for the purpose of sentence or resentence shall be governed by the provisions of law in effect prior to March 22, 1962: *Provided,*

* For the Court's convenience, we have reproduced the memorandum opinion as an Appendix to this Brief.

That the judge may, in his sole discretion, consider circumstances in mitigation and in aggravation and make a determination as to whether the case in his opinion justifies a sentence of life imprisonment, in which event he shall sentence the defendant to life imprisonment. Such a sentence of life imprisonment shall be in accordance with the provisions of this Act."

SUMMARY OF ARGUMENT

Discussion between the court and counsel with reference to a "burden" on appellant, had no relationship to the decision which did not rest upon any failure to sustain burden. In any event, if there was some burden on the appellant, such a result is proper under the decisions of this Court in *Jones* v. *United States*, 117 U.S. App. D.C. 169, 327 F.2d 867 (1963) and in *Coleman* v. *United States*, 118 U.S. App. D.C. 168, 334 F.2d 558 (1964), as well as under the language of the amendatory Act itself.

The court was not arbitrary and capricious in considering the factor of deterrence or in rejecting certain other factors as not in mitigation in this case. Nor was the court arbitrary and capricious in refusing to speculate upon the impact of subsequent judicial decisions and consider such impact as mitigation. Similarly there was no clear abuse of discretion in the court's refusal to treat as mitigating a prior inconsistent statement made by the surviving police officer.

The imposition of the death sentence upon one convicted of the murder of a police officer is not a cruel and unusual punishment.

Circumstances in aggravation, although not specifically labeled in the opinion, are readily apparent from the court's reference to the crime.

INTRODUCTION

The question before this Court, distinct from that before Judge McGarraghy, is not whether appellant should

be sentenced to death or to life imprisonment. Rather, the question is whether the Judge committed reversible error in the course of arriving at his decision.

The scope of review must be exceedingly narrow. The statute at bar speaks of the judge acting "in the sole discretion" and determining whether "in his opinion" the case justifies a sentence of life imprisonment. We suggest that reversal might follow only from a conclusion that the Judge's reasoning here was so arbitrary and capricious as to defy all reason. What the Judge did here was by no means arbitrary and capricious. The decision was rendered after full hearing of all defense evidence and contentions; it was a rational decision which cannot properly be characterized as an abuse of discretion.

ARGUMENT

I. The Court did not improperly place the burden of proof upon the appellant

(Tr. 6-7)

A. *As a practical matter the "burden" colloquoy was nothing more than a ruling as to the order of presentation and has no connection with the result below, which was not based upon any alleged failure to sustain burdens.*

At the outset of the hearing the following colloquoy took place:

> MR. WEINBERG: Yes. We want to proceed on the allegations of the amended motion. However, I say I was not able to ascertain with certainty whether a majority of the Court of Appeals regards this proceeding as a resentencing, in which the previous sentence is really of no force and we are considering sentence de novo, or whether they regard it as a motion to reduce sentence, in which the Defendant is the moving party. Three of the five-man majority of the Court of Appeals entering a concurring opinion in which they subscribed to the previous position.

THE COURT: I am of the opinion it is not a resentencing under the opinion of the Court of Appeals but is a matter of motion for reduction of sentence.
MR. WEINBERG: Is it Your Honor's ruling that the Defendant has the burden of proving it?
THE COURT: Yes, that would be my ruling.
MR. WEINBERG: In that event, Your Honor, I think it would be appropriate for us to go forward with calling witnesses.
THE COURT: I think so.
MR. WEINBERG: In an attempt to sustain our burden, although I would say in the record we would rely on the position of Judge Wright in the concurring opinion that the burden should not be imposed on the Defendant; but I believe that/a concurring opinion in both Willie Jones and Coleman.
THE COURT: Very well. (Tr. 6-7)

The question of burden is not elsewhere mentioned in the proceedings. The Court heard all evidence and all arguments offered by the defense. Nothing was excluded. The question of burden is not mentioned in the opinion, and the result does not appear to rest upon any alleged failure to carry a burden. The court's discretion is so broad that it may be exercised in a defendant's behalf without reference to any burden. We take it that the court is free to impose a life sentence for any reason. The very nature of the proceeding is such that an allocation of burden has no real significance and had none here.

B. ***If the Court did impose a burden upon appellant, such a ruling was proper under the decision of this Court on the previous appeal and under the language of the statute.***

In the previous appeal of this case, the appellant argued that Judge McGarraghy had improperly allocated the burden (Br. Nos. 17176, 17177, pp. 78-81). The prior judgment was set aside, five members of this Court voting for reversal on the ground that a trial-type hearing should have been conducted. Three of this five-man

majority there referred to a prior opinion wherein they had disagreed on the burden question.[1] The remaining two judges concurred outright in the reversal. The majority opinion stated:

> "Because the amendatory Act of 1962 was unique and its applicability to this case was a matter of first impression in the District Court, we have extensively explored its impact. We remand *only* that the judge may conduct an inquiry and the appellant be afforded a hearing pursuant to and as discussed in Part I. *supra*" (118 U.S. App. D.C. at 176; emphasis added).

Two other judges reversed "* * * *only* because appellant was not affirmatively tendered an opportunity to speak on his own behalf." (118 U.S. App. D.C. at 176; emphasis added). Two judges dissented from the reversal and would have affirmed the District Court (118 U.S. App. D.C. at 179). Hence, in *Coleman II*, six members of this Court saw nothing improper in the placing of the burden upon appellant.

Such a result is supported by the amendatory Act itself, which in pertinent part provides:

> "Cases tried prior to March 22, 1962, and which are before the court for the purpose of sentence or resentence shall be governed by the provisions of law in effect prior to March 22, 1962: *Provided*, That the judge may, in his sole discretion, consider circumstances in mitigation and in aggravation and make a determination as to whether the case in his opinion justifies a sentence of life imprisonment * * *"

This Court has held that the amendatory Act did not have the effect of vacating the prior death sentence (*Jones* v. *United States*, 117 U.S. App. D.C. 169, 173, 327 F.2d 867 (1963)). The prior sentence remains in effect, with the judge to determine whether the case "justifies" a sentence of life imprisonment. The case at that posture is

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[1] *Jones* v. *United States*, 117 U.S. App. D.C. 169, 178-180, 327 F.2d 867 (1963).

ripe for a motion to reduce sentence, which is the form apparently approved in *Jones* and in *Coleman II*. The use of the word "justifies" seems to us to connote the placing of a burden upon the party seeking to secure a reduction of sentence. Hence we think that insofar as a "burden" may have been placed on appellant here, such procedure was correct under *Jones*, *Coleman II*, and under the language of the amendatory Act itself.

II. The Court correctly dealt with the subject of deterrence

(Tr. 101)

At the hearing below the appellant offered, and the court heard, much evidence to show that the imposition of capital punishment was not justifiable on a deterrence theory. The Court ruled

> "* * * that it is inappropriate to discuss the contentions with respect to this phase of the matter since whether or not capital punishment should be abolished and whether or not the various contentions pro and con in regard to capital punishment are meritorious is a matter for the legislature and not for the Court." (opinion, p. 9)

Subsequently in the opinion, Judge McGarraghy made the following statement:

> "In this Court's original decision denying reduction of sentence I expressed the view that police officers are engaged in the dangerous business of protecting the public from vicious criminals and, when they become the victim of such criminals, the public interest, both from the point of view of deterrence and of punishment, requires that the penalty fixed by law be carried into effect." (opinion, p. 14)

Hence it is argued that the Court refused to consider defense evidence on the deterrence question, but nonetheless assumed the validity of the deterrence argument in electing to allow the death sentence to stand. We submit the court reasoned correctly here.

As Judge McGarraghy observed, during the Congressional debate on what became the amendatory Act, virtually all of the arguments as to capital punishment and deterrence were spread upon the record. Moreover, we note that one member of the House Committee of the District of Columbia actually filed a separate "dissent" to the Committee report wherein he urged, *inter alia*, that the imposition of capital punishment had no deterrent effect (House Rept. No. 677, 87th Cong. 1st Sess, p. 4). The enactment of a death penalty, in the teeth of these arguments, is a legislative decision that capital punishment may have a deterrent effect in some cases. Hence it is entirely within the Court's discretion to refer to deterrence in the course of finding that the case did not justify a sentence of life imprisonment. In this connection the Judge properly observed that the victim was a policeman killed in the line of duty. Surely the public has a particular interest in deterring such killings. We note that even in Great Britain, where imposition of the death penalty has been greatly altered, yet capital punishment remains when the victim is a police officer (Tr. 101). See also Note, "Executive Clemency in Capital Cases," 39 N.Y.U.L. Rev. 136, 159 (1964):

> "The more heinous the crime, the less the chance for clemency. Child molestation resulting in homicide, *killing of a police officer*, rape-murder, mutilation and torture, and hired assassination by their nature pose a more difficult case for clemency than do other capital offenses." (emphasis added).

Article 210.6(3)(f) of the Model Penal Code (P.O.D., 1962) lists as a circumstance in aggravation the fact that "the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody."

Thus, it cannot be said to be irrational for the court to consider deterrence as a factor in arriving at a decision to impose the death sentence.

III. The court below did not abuse its discretion, by finding after hearing all evidence, that in this case, the factors of mental retardation and socio-economic deprivation did not amount to circumstances in mitigation

(Tr. 10-12, 17, 19, 21, 24, 29, 31, 156-58, 160-61, 164-65, 172-74, 230-31, 235-38, 241)

Judge McGarraghy concluded as to the factors in issue that:

> "There was competent and convincing testimony upon which I find that none of the circumstances of the defendant's past life, his mental condition, or of the crime itself provide a reasonable medical or psychiatric explanation for the offenses of which he was convicted. I further find that none of these circumstances are in mitigation of punishment." (Opinion, p. 13)

The facts relevant to these matters may be summarized as follows:

A. *Mental Retardation.*

For purposes of the instant proceedings the court accepted as true the opinion that appellant is mentally retarded.

Two of the three psychiatrists who testified at the hearing were of the opinion that the homicide had been committed during a "panic state" (Tr. 10, 174). The third psychiatrist said that appellant "perhaps acted instictively rather than logically" (Tr. 231).[2] Two of the three psychiatrists, including one who was offered as an expert in mental retardation, testified as to a definite relationship existing between retardation and susceptibility to panic

[2] A fourth psychiatrist, who examined appellant and filed a written report, was of the opinion that the killing occurred "in a moment of panic" and that appellant "sincerely believed his own life was in danger." This doctor also said that appellant's consumption of alcohol "further weakened his judgment and controls." (Report of Dr. Lanham in record).

(Tr. 17, 156). The third psychiatrist differed, stating that in his opinion there was no direct correlation between retardation and panic (Tr. 235).

All three psychiatrists agreed that one who is mentally retarded tends to respond to the suggestions of a person held in respect (Tr. 11-12, 157, 174, 241). Appellant's brother suggested the robbery which culminated in the murder at bar. There was no evidence of any suggestion as to murder.

There was also evidence to the effect that appellant had consumed some alcohol prior to the offenses, and that this operated so as to diminish his judgment and controls (Tr. 19, 158, 231). One psychiatrist explained that the tendency of alcohol to suppress controls is all the more marked in cases of retardates (Tr. 158).

The two examining psychiatrists agreed that appellant had no psychosis at the time of examination (Tr. 11, 21, 230). One of these doctors testified that appellant was not neurotic (Tr. 235).

One of the examining psychiatrists described the relationship between appellant's mental condition and the crime as follows:

> "The general conclusion would be that this is a man of rather low intelligence who had come upon very hard times, indeed, having just lost his job and being almost entirely without funds. His suggestibility led him into agreeing to help his brother in this holdup, and when he entered into the holdup and encountered some difficulty in it entered an acute state of fright and felt that his life was endangered by the guns which were being held on him by the police officers, and did what at that time he felt instinctively to be necessary in order to preserve his own life." (Tr. 19.)

Another psychiatrist testified that "it is possible" that appellant's mental retardation had some relationship to the commission of the offense but that such could not be established with absolute certainty (Tr. 164). He explained: "I am not suggesting that any one condition such

as retardation caused him to commit the offense. I think that he may have had some experiences, some personal characteristic related to his retardation that were related to the commission of the offense." (Tr. 165). This doctor subsequently clarified his testimony on this point by referring to appellant's consumption of alcohol and diminution of controls, to his panic state, and to his suggestibility vis a vis the brother, all of which should be considered as "tied together" with the question of retardation (Tr. 174).

B. ***Background of Deprivation.***

There was evidence that appellant's mental retardation was probably aggravated by a background of deprivation and that the vast majority of mentally retarded individuals have backgrounds of cultural deprivation (Tr. 17,160-161). It was said that persons with such background are more likely to find themselves in a predicament such as that of appellant (Tr. 24). One psychiatrist stated that a background of deprivation is "certainly not" an excuse for the commission of crime (Tr. 24). Another psychiatrist, an authority on mental retardation, when asked whether appellant's offense was caused by or was the result of his deprived background answered:

> "In no direct way do I suggest that. I suggest that poor circumstances have aspects or factors in them that lead to a greater proportion of people coming from such circumstances committing crimes.
>
> "What makes those who rise to be great statesmen out of the slums versus those who rise to be criminals in numbers greater than we would like, I don't think anybody knows at this point. It is clear that murderers and kings can come from the slums." (Tr. 172-173.)

A third psychiatrist testified that appellant's background of deprivation did not provide a reasonable medical or psychiatric explanation for the offenses (Tr. 235). This doctor was also asked whether in his opinion the fact that

appellant had to leave his home for economic reasons was a reasonable medical or psychiatric explanation for the offenses. He answered:

> "Not directly. Of course, this man would have greater difficulty in obtaining employment and would lose his employment more readily by reason of his low-grade mental condition; but as a direct cause—many people of low-grade intelligence lead very normal lives." (Tr. 235.)

This doctor, asked to comment on prior evidence showing a high percentage of prisoners with low intelligence, stated that low intelligence is a factor but not the sole reason for their imprisonment. Of further significance is the fact that "people of low economic status have less opportunities for moral upbringing in their homes" (Tr. 237-238). In this case the court found that appellant came from a family with an "unusually good reputation" in its locale and that "he had fine home training."

C. ***The Court's rejection of these factors.***

There is nothing in the statute or legislative history which requires the judge to accept every hypothesis advanced by the convicted defendant and label it as "mitigating," much less to give it controlling weight. If discretion means anything at all, it must include the right of the judge to evaluate a particular line of evidence or theory as not mitigating. That the judge should not be bound by any rigid notions as to what is "mitigating" is implicit in this Court's decision in *Coleman II* where it was said (118 U.S. App. D.C. 168, 172, fn. 21, 334 F.2d 558, 562, fn. 21);

> "in *Winston* v. *United States*, * * * the Court said: 'The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right * * * but commits the whole matter of its exercise to the judgment and the consciences of the jury.' Such undoubtedly was the purpose of those who drafted the amendatory Act

> which authorized the opportunity for relief in the judge's 'sole discretion.'"

The rejection of these factors as not providing "a reasonable medical or psychiatric explanation of the offenses" was not arbitrary and capricious. A sentencing judge is free to make up his own mind as to what, if any, weight such factors shall be given.[3] Reasonable men may well differ as to what is or is not "mitigation"; reasonable men might differ as to whether certain factors offered in mitigation should be discounted for the reasons the Judge employed here. But such a difference of opinion cannot convert the court's reasoning into a clear abuse of discretion.

The court's finding as to the absence of a "reasonable medical or psychiatric explanation" in these factors has support in the record. As to retardation—and the components of panic, alcohol, and suggestibility—the court could fairly have concluded that they did not furnish a reasonable explanation of the murder. The court reasoned that "panic", as such, could be found in the case of any unintentional felony murder involving the killing of an officer who had surprised the felon. An indication of the reasoning may be found in questions which the court propounded to one of the psychiatrists:

> "You have in mind that this was an armed holdup of a liquor store, in which this man was participating with another. Wouldn't you say, or would you not say that in any armed holdup of a liquor store, where they are caught in the process of engaging in the armed holdup, that it would be a natural thing for anyone to panic? (Tr. 29.)
>
> * * * *
>
> "What I am getting at, in all candor, is this: We have had over the years a number of cases of armed

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[3] Compare *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-267 (1954): "And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience."

> holdups of liquor stores in similar instances. Is it suggested here that if a person engaging in an armed holdup is discovered in the act, he has a right to panic and to shoot and is to be excused on the ground that he panicked at the time he was discovered?" (Tr. 31.)

As Judge McGarraghy explained in his opinion:

> "Few killings during an armed robbery are actually premeditated. Such killings generally do result from fright or panic, but that does not constitute a justification or a mitigating circumstance. The applicable statute under which the defendant was convicted does not require proof of premeditation or of intent or desire to kill. It applies to precisely the factual situation which prevailed in the instant case." (Opinion, p. 12.)

While there was evidence that appellant's mental condition was a factor in the killing, none of the psychiatrists testified directly to a causal connection between mental condition and crime. Insofar as the murder might be viewed as the product of panic, the court could well have accepted the testimony of the third psychiatrist who saw no relationship between retardation and susceptibility to panic (Tr. 235.) As to the factor of suggestibility—established by all psychiatrists as related to retardation —the court could fairly have reasoned that although the brother suggested the robbery he did not suggest the killing and was not even in the alley at the time in question.[4] As to the factor of social deprivation, the court was free to accept the testimony that this circumstance did not provide a reasonable medical or psychiatric explanation for the crime (Tr. 235).

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[4] The weapon used in the robbery had been purchased by appellant and was turned over by appellant to the brother when appellant lost heart (J.A. 348). Appellant participated in the scheme by purporting to purchase a bottle and then reaching into the cash register while the brother held the gun (J.A. 340, 349).

IV. The Court was correct in refusing to speculate as to whether subsequent judicial decisions might entitle appellant to a new trial

(Tr. 188-192, 206-214)

At the hearing it was urged that a sentence should be reduced from death to life imprisonment where there is a possibility that subsequent judicial decisions might lead to the conclusion that the original trial was erroneous (Tr. 188-192, 206-214). The judge held the contention to be "without merit". He said that "It is inappropriate to speculate in this proceeding on the impact of judicial decisions since made or which may be made in the future" (opinion, p. 11).

Of course, a dead man cannot obtain a new trial. But insofar as the argument rests on the view that life should be preserved for the sake of future litigation, we point out that the instant proceedings in no way deprive appellant of his right to launch collateral attacks upon the conviction, wherein he may raise whatever legal questions he may choose. There is no need for him to proceed as passive beneficiary of litigation which some other prisoner may conduct at some future time.

It may be argued that that possibility of a more favorable result on re-trial should create sympathy for the defendant convicted prior to the decisions in question. But that is a matter for the discretion of the court. No two judges will respond in the same way to the same urgings of allegedly sympathetic considerations. One judge may feel that the ebb and flow of the judicial tide is a skimpy basis upon which to take a man's life. Another may reasonably feel that subsequent decisions really have nothing to do with the man himself or with his crime, in that they do not alter the truth.[5] This is an area where reasonable

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[5] Compare *Coleman II* (118 U.S. App. D.C. at p. 173) where this Court quoted with approval from a Supreme Court decision to the effect that a sentencing judge is not bound by the restrictive rules of evidence applicable at trial. See also Note, "Executive Clemency in Capital Cases," 39 N.Y.U.L.Rev. 136, 180 (1964): "The require-

men may differ, and is in our view, no basis for an assertion of an abuse of discretion.

V. The Court properly rejected the argument based on Winters' statement as not mitigating.

(Tr. 53, 216-220)

On the evening of the homicide, Officer Winters, the surviving officer, made a statement to Lieutenant Daly wherein Winters stated that after he pointed his gun at appellant and told him to put up his hands,

> "The man had one hand in his pocket and made a movement as if to pull his hand out of his pocket, either to pull a gun or to raise his hands."

At trial the appellant contended that he had raised both hands when confronted by Winters and had submitted to arrest (J.A. 343, 345, 350). Winters testified at trial as follows:

> "The man had both his hands in his pockets. The man took his left hand out of his pocket. He didn't take his right hand out of his pocket" (J.A. 50)
>
> * * * *
>
> "The defendant had both of his hands in his pockets. He took his left hand out of his pocket and put it at his side." (J.A. 373)

The question whether appellant had submitted to Winters was important at the trial, the case having gone to the jury on the theory that such submission could be regarded as having broken the link between the felony and the murder. See *Coleman* v. *United States*, 111 U.S. App. D.C. 210, 295 F.2d 555 (1961), *cert. denied*, 369 U.S. 813.

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ments of the clemency process necessitate an eradication of certain due process elements * * * which might detract from the value of the hearing as a means of arriving at a rational clemency decision. Thus, for example, a clemency authority may want to hear the contents of a coerced confession or view the fruits of an illegal search and seizure * * *."

Winters' statement to Daly was apparently not in the possession of defense counsel, who made no timely demand under 18 U.S.C. 3500. However, Daly's testimony at the coroner's inquest recited the substance of the statement;

> "And one hand in his pocket. He said he pointed the gun at the man, told him this was the Police, to put his hands up. He said the man made a movement, he didn't know whether it was to put his hands up or to pull a gun out of his pocket" (J.A. 22).

This inquest testimony was available to defense counsel at trial and was utilized by him in cross-examining Winters, although the aspect in issue was not reached (J.A. 50).

At the hearing below, Winters' statement, which apparently came to light in the pre-sentence report, was presented to Judge McGarraghy and argued as a circumstance in mitigation (Tr. 53, 216-220). Appellant's theory is that a) Winters' reference to the possibility of raising hands and b) Winters' apparent inconsistency as to whether one or both hands were in the pockets might have produced a favorable result at trial.

The Judge's opinion, finding that the case did not justify a sentence of life imprisonment, was silent on the question of Winters' statement, though obviously it was not persuasive to him as mitigation.[6]

This discounting of the Winters' statement was not arbitrary or capricious. The statement was not evidence of factual innocence, as in the case where it is suggested that someone else committed the crime. The statement was

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[6] In *Schilling* v. *Schwitzer-Cummins Co.*, 79 U.S. App. D.C. 20, 22, 142 F.2d 82 (1944) this Court said: "While counsel may be disappointed that findings do not discuss propositions sincerely contended for, that alone does not make them inadequate or suggest that such propositions were not understood by the court. A decision, as between two contestants, necessarily rejects contentions made by one or the other. * * * Certainly we should not require or encourage * * * judges * * to assert the negative of each rejected contention as well as the affirmative of those which they find to be correct."

available at trial, in the form of Daly's inquest testimony. The statement did not support appellant's basic claim—that he had raised *both* hands. The statement, at most, was merely impeaching and would not be admissible for the truth of the matter therein. In analyzing the credibility of appellant's testimony as to the events of the killing the court could consider appellant's denial of having fired the gun at any time (J.A. 352) as against evidence showing that two shots were fired into the body of the deceased and a third shot fired at Officer Winters. Under all of these circumstances, the refusal to consider the statement as mitigating was not a clear abuse of discretion.

VI. The imposition of the death penalty as to a defendant convicted of murder is not a cruel and unusual punishment

Several Supreme Court decisions demonstate that the imposition of the death penalty upon a convicted murderer—as distinguished from questions as to the particular technique of execution—is not barred by the "cruel and unusual" punishment provision in the Eighth Amendment. *Wilkerson* v. *Utah*, 99 U.S. 130 (1878); *In Re Kemmler*, 136 U.S. 436, 447 (1890); *Weems* v. *United States*, 217 U.S. 349, 369-371 (1910). See also *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958) (opinion of Chief Justice Warren) recognizing that "even execution may be imposed depending upon the enormity of the crime * * *." We note that even those Justices dissenting from the denial of certiorari in *Rudolph* v. *Alabama*, 375 U.S. 889 (1963) phrased the question as whether the Eighth and Fourteenth Amendments "permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life." As Mr. Justice Frankfurter said in a Fourteenth Amendment context,

> "A lifetime's preoccupation with criminal justice, as prosecutor, defender of civil liberties, and scientific student, naturally leaves one with views. Thus,

> I disbelieve in capital punishment. But as a judge I could not impose the views of the very few states who through bitter experience have abolished capital punishment upon all the other states, by finding that 'due process' proscribes it." *Haley* v. *Ohio*, 332 U.S. 596, 602 (1948) (separate opinion).

We do not understand the Eighth Amendment to turn on the presence or absence of particular facts relating to a particular accused, nor upon the rate of executions in a given jurisdiction. Surely the Supreme Court is not to rule upon the factual appropriateness of every death sentence as determined by the particulars of every individual case. Surely, also, the death penalty is not barred by the Eighth Amendment, as punishment for the murder of a policeman carrying out his duty.[7]

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
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FRANK Q. NEBEKER,
ALFRED HANTMAN,
JEROME NELSON,
Assistant United States Attorneys.

[7] The factors in aggravation, while not specifically labeled by the Court, are readily apparent from references to the facts of the crime.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISRICT OF COLUMBIA

Criminal No. 163-60

UNITED STATES OF AMERICA

v.

WILLIAM C. COLEMAN, DEFENDANT

MEMORANDUM

The defendant was indicted for violation of D. C. Code § 22-2401 (1951) and was convicted of the murder of a police officer while the defendant and his brother were perpetrating a robbery. This constituted murder in the first degree and, pursuant to the mandate of the statute then in effect, he was sentenced to death by electrocution. His conviction was affirmed by the United States Court of Appeals, *William C. Coleman* v. *United States*, 111 U.S. App. D.C. 210; 295 F.2d 555, cert. den. 369 U.S. 813, petition for rehearing den. 369 U.S. 842.

During the course of the appellate proceedings and while the petitions were pending in the Supreme Court, Congress enacted an amendment to the D. C. Code by Public Law 87-423, which abolished the mandatory death sentence and left to the jury a determination as to whether the punishment should be death by electrocution or life imprisonment, and authorized the trial judge to impose either a sentence of death or life imprisonment if the jury should fail to agree as to punishment.

Public Law 87-423 which became effective March 22, 1962, further provided that cases tried prior to that date and which were before the court for the purpose of sentence or resentence *shall be governed by the provisions of law in effect prior to March 22, 1962* (death by electrocution) provided "that the Judge may, in his sole discretion, consider circumstances in mitigation and in aggravation

and make a determination as to whether the case in his opinion justifies a sentence of life imprisonment, in which event he shall sentence the defendant to life imprisonment."

On March 29, 1962, defendant's counsel filed a motion to reduce the sentence to life imprisonment. After a complete and unrestricted argument and presentation by counsel for the defendant, this court denied the motion for reduction of sentence. Upon appeal, the Court of Appeals remanded the case for an evidentiary hearing (case numbers 17176 and 17177, decided May 1, 1964).

The Court of Appeals ruled that, while this court had made its ruling and denied the motion to reduce sentence on the only basis upon which it was proffered and argued, the court need not have been so limited in view of the purpose of the amendatory statute under which the court was authorized to ascertain whether or not a sentence of life imprisonment might be justified, and if so, that sentence was to carry a minimum imprisonment of twenty years.

The Court of Appeals pointed out that under the statute, matters entirely apart from evidence at a trial may and frequently do—and in proper cases should—affect the punishment to be accorded, once the issue of guilt has been resolved. The Court said, "While the facts of the crime are not without bearing, the purpose of the proviso of the amendatory Act was directed to the possible existence of circumstances in mitigation, not of the *crime*, per se, but of *punishment*."

The Court of Appeals further said: "To recapituate, Congress by the pertinent portion of Public Law 87-423 intended to create a mechanism here applicable to a previously convicted murderer by which the judge might determine whether the case 'justifies a sentence of life imprisonment.' * * * Congress chose to rely upon the experience, training and expertise of the judge who was to make the appropriate determination 'in his sole discretion' —that is, sitting without a jury. The legislative procedure clearly was to be pursued in light of the congressional in-

tent, and due process considerations required an appropriate inquiry as to all factors bearing upon the 'fateful choice of sentences'."

The Court of Appeals remanded the case "only that the judge may conduct an inquiry and the appellant be afforded a hearing pursuant to and as discussed in Part I, *supra*."

Thereafter, an evidentiary hearing was held at which witnesses testified and a number of exhibits were received in evidence. Prior to the hearing, counsel for the defendant filed an amended motion entitled "Amended Motion for Imposition of Sentence of Life Imprisonment" which asserted 27 grounds in addition to the grounds relied upon in the original motion.

Although 27 additional grounds relied upon in support of the amended motion were stated, they may be summarized as follows:

1. The background of the defendant constituted a factor in mitigation.
2. The defendant is mentally deficient which condition was causally connected to his commission of the acts comprising the offense and at least diminishes his responsibility for the death.
3. The circumstances of the crime itself are in mitigation of punishment.
4. The defendant's conduct during the period of his incarceration since sentence was originally imposed has been such as to show that he has achieved rehabilitation and would have prospects of continued rehabilitation if sentenced to life imprisonment.
5. Capital punishment is not a deterrent to the commission of homicides.
6. Subsequent judicial decisions indicate that defendant's conviction appears erroneous in the light of new precedents which post-dated the affirmance of defendant's conviction.

The following is the substance of the facts established at the evidentiary hearing.

THE DEFENDANT'S BACKGROUND

The defendant, William C. Coleman, was born on January 18, 1934, in Mineral, Louisa County, Virginia. He was the fifth of nine children born to Beatrice and James Coleman, both of whom came from Mineral, Virginia. One child died in infancy and the other eight have survived. Defendant completed the eighth grade in the public schools in Louisa County, Virginia.

The employment opportunities in a community such as Mineral were so limited that boys such as the Coleman boys could not obtain permanent full-time employment had they remained in that community as adults. Therefore, young men in that position, in order to obtain permanent full-time employment were obliged to migrate from the community.

William C. Coleman left home at the age of sixteen and went to Pennsylvania where he lived with an aunt for a year and then he came to Washington at the age of seventeen. He worked as an apartment house porter and for a year or so lived with his brother Raymond and Raymond's girl friend. He then moved away from his brother's home and lived in rooming houses up until the time of his arrest in this case.

An extensive survey has been made among the residents of Mineral and Louisa who knew the defendant and other members of the family. Few of the persons interviewed could comment knowingly regarding the character or behavior of the defendant from the time he left Mineral until the time of his arrest. However, the survey justifies the conclusion first, that his mother enjoyed an enviable reputation in the county; second, that all members of the family, including the defendant, bear a good name among both the white and negro members of the community; and third, that the defendant had an unusually good reputation in Louisa County, that he had fine home training, and the offense for which he was convicted is in sharp contrast to what was known in Louisa County as his normal behavior pattern. A number of

letters of recommendation from neighbors in Mineral were also received in evidence and were to the same general import.

After leaving the job as apartment house porter, the defendant held a number of part-time jobs and in 1953, he went work as a helper and finally as a truck driver for a Washington firm, for which he worked from October 22, 1953 to November 14, 1956 when he was drafted into the Army. Upon his honorable discharge from the Army he returned to that firm and continued to work from January 20, 1958 until he was discharged from his employment on December 23, 1959 because he was suspected of participation in the theft of company property.

Nothwithstanding his discharge, it is reasonable to conclude from the statement of his superior with the company that he was a good worker and a better worker than most of his 16 or 18 coworkers engaged in the same type of employment.

The occurrence which led to the defendant's conviction was on January 7, 1960, approximately three weeks after his discharge from employment, during which period he was unemployed and gradually becoming without funds.

The defendant has never married. For several years prior to his arrest in the instant case, he had a girl friend with whom he lived from time to time. At the time of the robbery and murder, the girl friend knew he was out of work and offered to support him until he got another job, but he declined the offer.

THE DEFENDANT'S MENTALITY

Counsel for the defendant assert that the defendant is mentally deficient and suffered from such condition at the time of the offense and that such deficiency affected his judgment and was causally connected to his commission of the acts comprising the offense, and, at least, diminishes his responsibility for the death.

As heretofore stated, he completed grade school. He has no difficulty in reading or writing.

After approximately one year's service in the Armed Forces, he was honorably discharged under the Army's program of separating servicemen of low IQ.

Clinically, he has an IQ of about 71 and he is sub-normal intellectually, but at a level that functioned satisfactorily as a laborer and truck driver.

There is on evidence of any abnormal emotional instability nor any evidence that he was or is psychotic. He would not be characterized as a neurotic. With the IQ rating of 71, by reason of his sub-normal intellect, he might be expected to be suggestible and influenced by others for whom he has respect and admiration.

The defendant had a serious alcohol problem. When he was a very small boy, he began drinking small quantities of whiskey furnished by his father.

Persons having the intelligence capacity of the defendant and being classified in the dull-normal group constitute approximately 10% of the population. They are not limited to any social, ethnic or religious background and may be found on every social level, although it appears that the percentage of mentally retarded is somewhat higher in lower socio-economic groups. The great majority of people in the United States having the intelligence level of the defendant have been able to function normally, get along in society, and take care of themselves, without any appreciable difficulty.

Statistics so far available support the conclusion that the less intelligent are more likely to be in prison for murder and the more intelligent are more likely to be in prison for armed robbery.

Studies so far completed indicate a finding of lower intelligence among the people convicted of crimes of violence than those convicted of other crimes.

The ratio shifts from three to one in favor of homicides among the most mentally retarded to a ratio of one to two among the most intelligent in our prisons.

THE CIRCUMSTANCES OF THE CRIME

The felony-murder of which defendant stands convicted is described in the opinion of the Court of Appeals, *Coleman* v. *United States*, *supra*, to which reference is made for the facts of the crime.

Consideration should be given, for the purpose of this motion, to the facts and circumstances prior and subsequest to the murder which were developed during the course of the hearing on the motion.

The defendant was discharged from his last employment on December 23, 1959, and he had been unemployed for the three weeks that followed until January 7, 1960 when the crime was committed. His cash resources were reduced to $5.00 which he was planning to use to buy gasoline for his car to drive back to his home in Louisa County, Virginia. He says that he and his brother had gone out together to see if either one of them had hit a number; that his brother was then writing some numbers and they were on their way to pay off a hit that a customer had won when they drove near the liquor store in question.

The brother had the idea of robbing the liquor store and suggested it to the defendant, pointing out that if they got money that way he would not have to leave Washington. The defendant agreed to the suggestion and turned over to the brother a gun which the defendant owned and which the brother intended to use and did use in the hold-up while the defendant grabbed the money from the cash register.

On the day of the crime, the defendant and several others had been drinking beer and wine. Later in the day, while planning the robbery, he split half a pint of whiskey with his brother.

When the defendant heard the police emerging from the rear room of the store, the defendant and his brother fled from the store and on the outside ran in opposite directions. Either at the time defendant was aware of police being in the store or at a subsequent time when he was

confronted by Officer Brereton in the alley, he became frightened and panicked, the scuffle with Officer Brereton occurred, and the shooting took place, resulting in Officer Brereton's death. The defendant thereupon ran from the scene, hailed a taxicab, went home, hid the gun, and spent his time going from friend to friend and after two days surrendered to the authorities.

THE DEFENDANT'S POST-CONVICTION CONDUCT

Defendant has been incarcerated since his conviction and reports which have been received from the Protestant Chaplain and from the Catholic Chaplain comment favorably on the rehabilitation which has been accomplished in the period of his confinement and on his prospects of continued rehabilitation if sentenced to life imprisonment. The report from the Catholic Chaplain includes the following paragraph:

> I have known Coleman about two years while he was confined to Death Row at the Jail and in that time he has always impressed me as a person who is very alert and intelligent. This can be brought out by the fact that he always showed interest in improving his ability to read and write. He occupied himself with books on English grammar and made a project of increasing his vocabulary by the constant use of a dictionary. His range of reading matter was quite extensive and certainly not taken up with trash type literature. Above all he is the essence of order and cleanliness. His cell is always immaculate, never out of order or allowed to be dishevelled for one moment. I believe that he makes a very great effort to keep his mind busy and to keep from brooding over the gravity of his crime or to get depressed from the jail atmosphere.

The Chaplain's letter also contains the following statement:

> In summary, I would say that Coleman should be given a reduction in sentence because he would be

> an asset in any institution where he would be able to apply his intelligence to the benefit not only to himself but also to the institution. As far as I can recall he has never caused any trouble with the officers or the inmates. Certainly he is not a custodial problem. He is fully aware of the gravity of what he did and he would be most grateful for an opportunity to redeem himself in the eyes of society.

The total of the evidence reasonably supports the conclusion that the defendant has been a model prisoner. He is a fairly good influence on those who are around him. He would be a good risk for rehabilitation. The possibilities of recidivism are remote. He has adjusted well to prison life and would be a good influence to the prison community.

THE JUSTIFICATION OF CAPITAL PUNISHMENT

Counsel for the defendant offered much testimony by distinguished experts in the fields of sociology and civil rights to the effect that the imposition of capital punishment does not serve as a deterrent to the commission of homicides in general or deter fatal attacks on police officers and also challenging capital punishment in the United States as an appropriate form of punishment.

One witness was a distinguished professor of sociology at the University of Pennsylvania, who has written and testified on the subject of capital punishment for many years. His testimony tends to establish a trend showing either the abolition of the death penalty in some countries or a reduction in the use of capital punishment even when available. Instances also were cited where capital punishment has been abolished and later reintroduced.

Evidence was introduced by defendant's counsel in support of the contention that the death penalty discriminates against the poor and under-privileged and that the people at the lower end of the economic ladder are the ones who are sentenced to death. A distinguished profes-

sor and expert in the fields of civil liberties and civil rights testified that "Statistics indicate that it is the negro who by and large, way out of proportion to his number in the population, is executed. * * * Negroes commit from three times to six times the amount of capital offenses as white people do. * * *"

The Court is of the opinion that it is inappropriate to discuss the contentions with respect to this phase of the matter since whether or not capital punishment should be abolished and whether or not the various contentions pro and con in regard to capital punishment are meritorious is a matter for the legislature and not for the Court. The fact is that the Congress only recently dealt with the subject by passage of the amendatory statute retaining capital punishment, and abolishing only its mandatory features. The legislative history shows that when the legislation was pending in the Senate, an amendment to the Bill was proposed but was defeated, which would have abolished the death penalty and substituted mandatory life imprisonment. In the course of the Senate debate, most of the contentions which have been advanced in the course of this hearing were there argued with vigor. Also, during the debate in the Senate, there was inserted in the record an article by the same distinguished professor of sociology who testified in this proceeding, which supported in general the same thesis he advanced at the hearing in this case. Also, there was inserted in the record an article written by the present chief counsel for the defendant and published in a Washington newspaper on March 6, 1960 entitled "A Relic of the Barbarious Days When Law Demanded Eye for Eye".

The report of the Committee on the District of Columbia recommending enactment of the amendatory law stated that "In most state jurisdictions, as well as in the Federal criminal law applicable outside the District of Columbia, capital punishment is permissive. In most states, as well as in Federal law, in general, the penalty

for first degree murder is death unless the jury recommends life imprisonment. That is what this legislation would accomplish."

The amendatory law as finally enacted expressly provided that cases tried prior to the effective date of the Act shall be governed by the provisions of law in effect prior to the effective date of the Act (mandatory death by electrocution) subject only to the procedure under which the Judge may reduce the sentence to life imprisonment.

THE EFFECT OF SUBSEQUENT JUDICIAL DECISIONS

Counsel for the defendant further contend that judicial decisions in other cases since the affirmance of the conviction of the defendant in this case have indicated and may continue further to indicate that defendant's conviction appears erroneous in the light of new precedents which post-dated the affirmance of defendant's conviction.

The Court is of the opinion that this contention is without merit. The fact is that, in this case, the defendant was tried and convicted and all questions of law which were raised were considered by the Court of Appeals and the judgments of conviction were affirmed by that Court, with certiorari denied by the Supreme Court.

It is inappropriate to speculate in this proceeding on the impact of judicial decisions since made or which may be made in the future.

THE DEFENDANT'S ALLOCUTION

At the conclusion of all the evidence and prior to argument by his counsel, the defendant was asked if he had anything he wanted to say in his own behalf. He thereupon addressed the Court. He expressed appreciation for the hearing. He requested mercy and reduction of the sentence in order that he might have time to repent and dedicate his life to the Lord and the rest of mankind. He also expressed sorrow for the misdeed which he had committed against his fellow man.

CONCLUSION

The foregoing is a summary of the facts established at the hearing on the defendant's motions.

Counsel for the petitioner has urged with commendable earnestness in a most carefully and expertly prepared presentation that the facts constitute mitigating circumstances which justify and indeed require reducing the sentence from death to life imprisonment as authorized by the statute.

I do not agree that the facts constitute circumstances in mitigation of punishment or that the sentence should be reduced from death to life imprisonment.

The testimony of the psychiatrists is that the defendant is mentally retarded. The report from the Catholic Chaplain states that he is "very alert and intelligent". Accepting the psychiatric testimony for the purpose of this motion, there is no evidence in this case of any causal connection between this mental condition and the crimes which he committed. The nearest that any witness came to causation was the testimony of one psychiatrist called by defendant's counsel that Coleman has a borderline intelligence and "it is *possible* that this borderline intelligence has some relationship to the commission and nature of his crime." There was competent and convincing testimony to the contrary and I find that there was no causal relationship between his mental retardation and the crime of which he was convicted.

Counsel contend that at the time of the killing, the defendant became frightened and entered an acute state of panic, and that the killing was not premeditated. The evidence establishes that panic states can come about in people of normal intelligence or people of very high intelligence, but they are more common in people of low intelligence. Also, panic states occur to all segments of our population, whether they are intelligent or stupid, and the facts of the killing in this case do not indicate a disordered perception of the defendant at the time of the offense. Few killings during an armed robbery are actu-

ally premeditated. Such killings generally do result from fright or panic, but that does not constitute a justification or a mitigating circumstance. The applicable statute under which defendant was convicted does not require proof of premeditation or of intent or desire to kill. It applies to precisely the factual situation which prevailed in the instant case.

I refer to the opinion of the Court of Appeals affirming the conviction in which it held that the jury "readily could have concluded that Coleman, overtaken and faced with capture, not only did not submit, but rather had determined to fight his way to escape. After or while wresting the gun from the officer, he shot Officer Brereton twice and thereafter shot Officer Winters once and fled, not to be placed in custody until after he had surrendered to the F.B.I., nearly two days later."

Defense counsel also urges that the defendant was reared in conditions of poverty and possessed limited natural and environmental endowments and that this constitutes a mitigating factor. There is competent and convincing testimony in this case that this circumstance does not provide a reasonable medical or psychiatric explanation for the offenses of which the defendant was convicted. In my opinion, rather than mitigation, the fact that the defendant departed from the training which he had received from his mother and failed to live up to the reputation which he and the other members of his family enjoyed in their home community constitutes a factor more in aggravation than in mitigation.

Evidence was introduced by the defendant that the number of negroes who commit and are punished for capital offenses is large in proportion to their percentage of the total population. I do not understand the purpose of this offer. The only conclusion would be that more negroes than members of other races commit capital offenses. I deplore the injection of the racial issue in this case in which there is not the slightest justification for any suggestion of racial discrimination. The fact

that the defendant is a negro is not a circumstance in mitigation of punishment.

There was competent and convincing testimony upon which I find that none of the circumstances of the defendant's past life, his mental condition, or of the crime itself provide a reasonable medical or psychiatric explanation for the offenses of which he was convicted. I further find that none of these circumstances are in mitigation of punishment.

The reports of the Chaplains of the adjustment which the defendant has made in the places of his confinement are encouraging and, if factors of a mitigating character were present, they would carry weight in resolving the issue. However, standing alone, his subsequent conduct in prison is not a circumstance in mitigation of punishment.

The Court of Appeals pointed out in its opinion remanding the case for an evidentiary hearing that the amendatory Act was directed to "the possible existence of circumstances in mitigation, not of the *crime*, but of *punishment*." I do not understand this to mean that this Court is not also to take into consideration the circumstances of the crime. In this case, while it is true the defendant's brother suggested the proposed robbery, the defendant willingly and actively participated; he provided the gun which his brother used, and it was he who set up the robbery by ordering a bottle of whiskey and tendering a bill in payment; and it was he who actually snatched the money from the cash register while the brother held the gun on the store owner. After running from the store, he killed a rookie policeman engaged in the performance of his duty to protect the public, following which he escaped and did not surrender until two days later.

In this Court's original decision denying reduction of sentence, I expressed the view that police officers are engaged in the dangerous business of protecting the public from vicious criminals and, when they become the vic-

tim of such criminals, the public interest, both from the point of view of deterrence and of punishment, requires that the penalty fixed by law be carried into effect. The action of the defendant was described by the Court of Appeals in its original opinion affirming the conviction as a "savage and desperate attempt by Coleman to shoot his way to freedom". In my opinion, the defendant and his brother were engaged in a nefarious venture, the type of which happens too often.

Upon consideration of all the circumstances in mitigation and in aggravation, it is the determination of the Court that the case, in its opinion, does not justify a sentence of life imprisonment, but that the sentence shall be governed by the provisions of law in effect prior to the effective date of Public Law 87-423.

Accordingly, the defendant's original motion for reduction of sentence and his amended motion for imposition of sentence of life imprisonment are denied.

This Memorandum shall constitute the Court's Findings of Fact and Conclusions of Law.

/s/ JOSEPH C. MCGARRAGHY
Judge

January 8, 1965

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